Indiana Law Review

Volume 8 1975 Number 4

The Emerging Federally Secured Right of Political Participation

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I. Introduction

Judicial decisions on voting rights chronicle the growth of American democracy. Few aspects of our national life have proved more amenable to judicial intervention. The emerging federally secured right of political participation has largely been the work product of the federal courts. Dramatic increases in the level of popular political participation made possible by favorable judicial decisions suggest the need for an overview—for taking stock of how far we have come since the early days of the Republic. As early as 1886, the Court declared in *Yick Wo v. Hopkins*[1] that voting is "a fundamental right because it is preservative of all rights."[2] *Yick Wo* was the harbinger of a distant future. Not until "much later, indeed not until the 1961 Term—nearly a century after the Fourteenth Amendment was adopted—was discrimination against voters on grounds *other than race* struck down."[3] Since the Court held that the apportionment of state legislatures was subject to review under the equal protection clause of the fourteenth amendment in *Baker v. Carr*,[4] the seed planted by the Court in *Yick Wo* has, three-quarters of a century later, begun to bear fruit.

This Article will review the highly restrictive, antidemocratic practices which characterized access to the political system in many parts of the United States from the adoption of early

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[1]118 U.S. 356 (1886).

[2]*Id.* at 371.

[3]Oregon v. Mitchell, 400 U.S. 112, 136 (1970) (Douglas, J., dissenting) (emphasis in original).

[4]369 U.S. 186 (1962).

state constitutions until the pace of change began to quicken little more than a decade ago. Traditional constitutional doctrine on voting and political candidacy will be critically examined. Recent decisions of the Supreme Court extending the right to vote will be considered with emphasis on the expanding scope of federal judicial review. The emergence of a federally secured right of political participation, which extends to voting and to political candidacy, also will be identified and its parameters delineated. However, the validity of age and durational residency requirements for public office are beyond the scope of this Article.

II. State Restrictions on Voting and Political Candidacy Imposed by Early State Constitutions

The right of widespread popular political participation does not "share in the glorious history of other democratic values."[5] At the time of the American Revolution, voting and candidacy for public office were narrowly restricted in most states to a very small portion of the population. Early state constitutions jealously guarded against popular access to the ballot or public office through a plethora of exclusions: property ownership, poll taxes, personal wealth, religion, sex, age, race, and durational residency. The ancestry of the traditional doctrine can be traced directly to the union of landed aristocracy and powerful commercial interests which dominated the young Republic at the close of the eighteenth century.[6] In the century following the Civil War there was also a proliferation of vague state constitutional provisions which disfranchised for illiteracy, economic and social status, and conviction of certain crimes. Such provisions were easily subject to selective enforcement on racial and economic grounds. Significantly, these restrictive practices of early state constitutions were continued to a greater or lesser extent in most states until as recently as the 1960's and were protected by traditional constitutional doctrine which immunized state electoral practices from federal judicial review.

The restrictions in the early state constitutions are generally inconsistent with a political system in which each member of the adult population is extended the opportunity for effective political participation. Consideration of the various restrictions on

[5]Gangemi v. Rosengard, 44 N.J. 166, 169, 207 A.2d 665, 666 (1965).

[6]*See, e.g.*, C. Beard, An Economic Interpretation of the Constitution of the United States (1913); J. Main, The Antifederalists: Critics of the Constitution, 1781-1788 (1961). *But see* R. Brown, Charles Beard and the Constitution (1956); C. Warren, The Making of the Constitution (1937). A general picture of the growth of the American constitutional system is presented in A. Kelley & W. Harbison, The American Constitution (rev. ed. 1955).

voting and political candidacy in an historical context exposes the social, economic, ethnic, and sexist bias of traditional constitutional doctrine. As the cumulative impact of the various restrictions is apprehended, claims of their validity based on nothing other than long continued practice and tradition can be evaluated more realistically. Moreover, the various restrictions frustrating popular participation in the political process throughout our history can be traced, almost without exception, to the qualifications established in early state constitutions. The protracted struggle to remove the various archaic state restrictions on popular access to the political process is a documentary of the growth of American democracy.

Property Ownership—Property ownership requirements for voting and candidacy were common in the early state constitutions.[7] For example, the New Jersey Constitution of 1776 limited the right to vote for representatives in the council and assembly to inhabitants with a worth of fifty pounds.[8] Membership on the New Jersey legislative council was restricted to freeholders with a worth of at least one thousand pounds, proclamation money, of real and personal estate.[9] The early state constitutions were patterned after English law which had long confined the suffrage and public office to substantial property owners.[10] There were variations in the size or value of the freehold required as a precedent to voting.[11] Substantially larger property requirements were established for candidacy for public office than for voting. The most restrictive property requirements were attached to the most important offices. Thus, the Georgia Constitution of 1789 required that senators possess a freehold of 250 acres or some property in the amount of 250 pounds and that representatives possess a freehold of 200 acres or some property in the amount of 150 pounds.[12] The Governor of Georgia, in comparison, was required to be possessed of "five hundred acres of land, in his own right, within this State, and other species of property to the amount of one thousand pounds sterling."[13]

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[7]*See generally* 1-6 AMERICAN CHARTERS, CONSTITUTIONS AND ORGANIC LAWS (F. Thorpe ed. 1906) [hereinafter cited as THORPE].

[8]N.J. CONST. arts. III, IV (1776), *reprinted in* 5 THORPE 2595.

[9]*Id.*

[10]1 Hen. 5, c. 1 (1413). This Act of Parliament restricted voting to those who had free land valued at forty shillings a year above all charges.

[11]*Compare, e.g.*, the New Jersey fifty pound qualification *with* the Georgia ten pound and the New York twenty pound classifications. GA. CONST. art. IX (1777), *reprinted in* 2 THORPE 779; N.Y. CONST. art. VII (1777), *reprinted in* 5 THORPE 2630.

[12]GA. CONST. art. I, § 3 (1789), *reprinted in* 2 THORPE 786.

[13]*Id.* art. II, § 3, 2 THORPE 787.

In the early days of the Republic, even the apportionment of elected representatives sometimes was based upon property considerations.[14] Under an 1835 amendment to the North Carolina Constitution of 1776, public taxes paid into the state treasury constituted the basis of apportionment of state senatorial districts.[15] The South Carolina Constitution of 1778 likewise provided for reapportionment according to "white inhabitants and . . . taxable property."[16] Some states permitted nonresident property owners to vote on the basis of their ownership of property in a particular district.[17] Similarly, nonresident property owners were eligible for election to the South Carolina House of Representatives and Senate by the districts in which they owned property.[18] Some early state constitutions specifically excluded paupers from political candidacies.[19]

Poll Taxes—Likewise, access to the ballot often was restricted to persons who had paid a poll tax. The New Hampshire Constitution of 1784, for example, extended the franchise to any otherwise qualified voter paying a poll tax.[20] Similarly, the New York Constitution of 1777 limited the franchise to otherwise qualified voters with a freehold of twenty pounds or a rented tenement with a yearly value of forty shillings and who had "been rated and actually [had] paid taxes to this State."[21]

Religious Tests—Religious tests for access to the ballot and to public office also were established by some early state constitutions. The Georgia Constitution of 1777 required that its representatives "be of the Protestant religion."[22] The South Carolina Constitution of 1778 limited voting to any otherwise qualified elector "who acknowledges the being of a God, and believes in a further state of rewards and punishments."[23] The South Carolina Constitution of 1895, which currently is in force, provides that "[n]o person shall be eligible to the office of Governor

[14]*See, e.g.*, U.S. CONST. art. I, § 2, cl. 3. This clause contained the noted "three-fifths compromise," under which the property interests in slaves of citizens of some states was recognized as a basis for apportionment of United States Representatives. See 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 196-201 (M. Farrand ed. 1966) [hereinafter cited as RECORDS]; 2 *id.* at 219-23.

[15]N.C. CONST. amend. I, § 1 (1835), *reprinted in* 5 THORPE 2794.

[16]S.C. CONST. art. XV (1778), *reprinted in* 6 THORPE 3252.

[17]*See, e.g.*, MD. CONST. art. IV (1776), *reprinted in* 3 THORPE 1691. *See also* S.C. CONST. art. I, § 4 (1790), *reprinted in* 6 THORPE 3258.

[18]S.C. CONST. art. I, §§ 6, 7 (1790), *reprinted in* 6 THORPE 3259. *But see, e.g.*, N.C. CONST. art. IX (1776), *reprinted in* 5 THORPE 2790.

[19]*See, e.g.*, MASS. CONST. amend. III (1821), *reprinted in* 3 THORPE 1912.

[20]N.H. CONST. pt. II (1784), *reprinted in* 4 THORPE 2459.

[21]N.Y. CONST. art. VII (1777), *reprinted in* 5 THORPE 2630.

[22]GA. CONST. art. VI (1777), *reprinted in* 2 THORPE 779.

[23]S.C. CONST. art. XIII (1778), *reprinted in* 6 THORPE 3251.

who denies the existence of the Supreme Being."[24] The Vermont Constitution of 1777 provided that no religious test would ever be required of any civil officer or magistrate in that state except the following declaration:

> I do believe in one God, the Creator and Governor of the universe, the rewarder of the good and punisher of the wicked. And I do acknowledge the scriptures of the old and new testament to be given by divine inspiration, and own and profess the protestant religion.[25]

Sex—Early state constitutions restricted suffrage and eligibility for public office to males who were otherwise qualified.[26] In 1875 the Supreme Court held that the right to vote was not protected by the privileges and immunities clause of the fourteenth amendment and that state governments were republican in form within the meaning of the guaranty clause notwithstanding their denial of the suffrage to women.[27]

Age—The franchise was restricted under the early state constitutions to otherwise qualified voters twenty-one years of age or over. Moreover, the right to vote was not extended to persons under the age of twenty-one until Georgia, in 1943, and Kentucky, in 1955, permitted eighteen-year-olds to vote.[28] Age restrictions on candidacy for public office which discriminate against otherwise qualified voters have been established by the federal and state constitutions and have prevailed virtually without challenge until the past several years.

Race—Early state constitutions varied considerably in their treatment of race as a restriction on the franchise. Massachusetts, New Hampshire, New Jersey, and New York, for example, permitted otherwise qualified "inhabitants" to vote without regard to race.[29] Pennsylvania, Maryland and North Carolina allowed otherwise qualified "freemen" to vote, a restriction exclusive of slaves but inclusive of free colored persons.[30] Of the thir-

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[24]S.C. CONST. art. IV, § 3. This qualification was retained in the 1973 amendment of this article. *Compare* S.C. CONST. art. XXXVIII (1778), *reprinted in* 6 THORPE 3255, declaring the "Christian Protestant religion" to be the "established religion of this State."

[25]VT. CONST. art. IX (1777), *reprinted in* 6 THORPE 3743. *See also* DEL. CONST. art. 22 (1776), *reprinted in* 1 THORPE 566. *Compare* the "free exercise" clause of VA. CONST. § 16 (1776), *reprinted in* 7 THORPE 3814.

[26]*See, e.g.*, PA. CONST. § 6 (1776), *reprinted in* 5 THORPE 3084.

[27]Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1874).

[28]Oregon v. Mitchell, 400 U.S. 112, 245 (1970) (Brennan, J., dissenting). Alaska and Hawaii, since their admission to the Union in 1959, have extended the vote to nineteen-year-olds and twenty-year-olds respectively. *Id.* at 245 n.28.

[29]Minor v. Happersett, 88 U.S. (21 Wall.) 162, 172 (1874).

[30]*Id.* at 172-73. In 1835 North Carolina prohibited free Negroes or mu-

teen original states, only South Carolina restricted the vote to "white" persons.[31] As new states were admitted to the Union, however, they frequently restricted the suffrage to persons of the "white" race.[32] Neither Orientals nor American Indians were eligible under state constitutional provisions restricting the franchise to "white" persons. The California Constitution of 1879 spoke unmistakably to the suffrage status of naturalized United States citizens of Chinese origin:

> [N]o native of China, no idiot, insane person, or person convicted of any infamous crime and no person hereafter convicted of the embezzlement or misappropriation of public money, shall ever exercise the privilege of an elector in this State.[33]

Durational Residency—Most early state constitutions imposed state or county durational residency requirements of varying length on voting. One-year durational residency requirements were established by Pennsylvania,[34] North Carolina,[35] Maryland,[36] New Jersey,[37] and South Carolina.[38] Six-month durational residency requirements were adopted by Georgia[39] and New York.[40]

Significantly, neither Massachusetts nor New Hampshire imposed durational residency requirements on voting in their early constitutions. Massachusetts required only that otherwise qualified voters be inhabitants.[41] The following clause was adopted in explanation of the inhabitancy requirement:

> And to remove all doubts concerning the meaning of the word, "inhabitant" in this constitution, every per-

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lattos to the fourth generation from voting. N.C. CONST. amend. I, § 3, cl. 3 (1835), *reprinted in* 5 THORPE 2796.

[31]Minor v. Happersett, 88 U.S. (21 Wall.) 162, 172 (1874).

[32]*See, e.g.*, ALA. CONST. art. III, § 5 (1819), *reprinted in* 1 THORPE 99; CAL. CONST. art. II, § 1 (1849), *reprinted in* 1 THORPE 393; MISS. CONST. art. III, § 1 (1817), *reprinted in* 4 THORPE 2035; ORE. CONST. art. II, § 2 (1857), *reprinted in* 5 THORPE 3000.

[33]CAL. CONST. art. II, § 1 (1879), *reprinted in* 1 THORPE 415.

[34]PA. CONST. § 6 (1776), *reprinted in* 5 THORPE 3084. *Compare* PA. CONST. art. III, § 1 (1790), *reprinted in* 5 THORPE 3096, which required residence "in the State two years next before the election, and within that time . . . [payment of] a State or County tax, which shall have been assessed at least six months before the election."

[35]N.C. CONST. arts. VIII, IX (1776), *reprinted in* 5 THORPE 2790.

[36]MD. CONST. art. II (1776), *reprinted in* 3 THORPE 1691.

[37]N.J. CONST. art. IV (1776), *reprinted in* 5 THORPE 2595.

[38]S.C. CONST. art. XIII (1778), *reprinted in* 6 THORPE 3251. The durational residency requirement for voting was increased to two years in S.C. CONST. art. I, § 4 (1790), *reprinted in* 6 THORPE 3258.

[39]GA. CONST. art. IX (1777), *reprinted in* 2 THORPE 779.

[40]N.Y. CONST. art. VII (1777), *reprinted in* 5 THORPE 2630.

[41]MASS. CONST. art. II (1780), *reprinted in* 3 THORPE 1895.

> son shall be considered as an inhabitant, for the purpose of electing or being elected into any office, or place within this state in that town, district or plantation where he dwelleth, or hath his home.[42]

The New Hampshire Constitutions of 1784 and 1792 were patterned after the Massachusetts Constitution of 1780 and included an inhabitancy rather than a durational residency requirement.[43] An inhabitancy requirement patterned after the Massachusetts Constitution of 1780 also was adopted at the Federal Constitutional Convention as the only residency qualification for membership in the United States Senate and House of Representatives.[44] Under the Articles of Confederation, some states had imposed lengthy state durational residency requirements for election as delegates to the Congress.[45]

Each of the early state constitutions imposed durational residency requirements for public office, although there was, as there is now, substantial variation among the states in the length of durational residency required for election to the same office. Early durational residency requirements for governor ran the gamut: South Carolina—ten years,[46] North Carolina—five years,[47] and Connecticut—one year.[48] There is no evidence that Connecticut suffered as a result of its one-year requirement or, conversely, that South Carolina or North Carolina benefited from their longer requirements.

Literacy Tests—In the century following the Civil War, literacy tests became closely identified with the racial exclusion policies of Southern states. But literacy tests were by no means

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[42] *Id.*, 3 THORPE 1896. *But see id.* amend. III (1835), 3 THORPE 1912 (one-year durational residency required for voting).

[43] N.H. CONST. pt. II (1784), *reprinted in* 4 THORPE 2459; N.H. CONST. (1792), *reprinted in* 4 THORPE 2479.

[44] *See* 2 RECORDS, *supra* note 14, at 216-19.

[45] *See, e.g.*, MD. CONST. art. XXVII (1776), *reprinted in* 3 THORPE 1695 (five-year state durational residency required for election from Maryland as delegate to Congress). *Compare* 2 RECORDS, *supra* note 14, at 217, in which Mr. Mercer of Maryland remarked that a state durational residency requirement for membership in the United States Senate and House of Representatives

> would present a greater alienship among the States than existed under the old federal system. It would interweave local prejudices & State distinctions in the very Constitution which is meant to cure them. He mentioned instances of violent disputes raised in Maryland concerning the term "residence."

[46] S.C. CONST. art. V (1778), *reprinted in* 6 THORPE 3249; S.C. CONST. art. II, § 2 (1790), *reprinted in* 6 THORPE 3262.

[47] N.C. CONST. art. XV (1776), *reprinted in* 5 THORPE 2791.

[48] CONN. CONST. art. IV, § 1, and art. VI (1818), *reprinted in* 1 THORPE 540, 544.

limited to the South,[49] and in 1959 the Supreme Court upheld the facial validity of a literacy test.[50] Loosely worded tests of voter "understanding" adopted by many states vested local officials with unbridled discretion and invited discrimination on racial and economic grounds. The Alabama Constitution of 1901, for example, provided that voters must be "persons who are of good character and who understand the duties and obligations of citizenship under a republican form of government."[51]

Moral Character—Conviction of crimes involving moral turpitude historically has been a ground for denial of the franchise and for disqualification from public office.[52] Although the state interest in preventing electoral fraud is compelling, the loosely worded moral character qualifications adopted by many states demonstrably were intended to exclude on racial, economic, or status grounds rather than to preserve the purity of the ballot box. The Alabama Constitution of 1901 denied the vote to physically able persons who had not "worked or been regularly engaged in some lawful employment, business or occupation, trade or calling for the greater part of the twelve months next preceding the time they offer to register . . . ."[53] In addition to excluding persons convicted of specified as well as unspecified crimes involving moral turpitude, the Alabama Constitution of 1901 excluded persons "convicted as a vagrant or tramp" and persons convicted of assault and battery on their wives, bigamy, adultery, sodomy, miscegenation or crimes against nature.[54]

Citizenship—Many states have restricted the suffrage to citizens of the United States, while others have extended it to persons of foreign birth who have declared their intention to become citizens of the United States.[55] Likewise, candidacy for public office has been restricted in some instances to natural born citizens of the United States.[56]

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[49]*See, e.g.*, MASS. CONST. amend. XX (1857), *reprinted in* 3 THORPE 1919.

[50]Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45 (1959).

[51]ALA. CONST. art. VIII, § 180 (1901), *reprinted in* 1 THORPE 210. *But see* Louisiana v. United States, 380 U.S. 145 (1965).

[52]*See, e.g.*, MD. CONST. art. LIV (1776), *reprinted in* 3 THORPE 1700. *See also* Cohen, *Tennessee Civil Disabilities: A Systemic Approach*, 41 TENN. L. REV. 253, 256-67 (1974).

[53]ALA. CONST. art. VIII, § 181 (1901), *reprinted in* 1 THORPE 210.

[54]*Id.* § 182.

[55]*See* Minor v. Happersett, 88 U.S. (21 Wall.) 162, 177 (1874).

[56]U.S. CONST. art. II, § 1, cl. 5 (President of the United States). *But cf. In re* Griffiths, 413 U.S. 717 (1973) (exclusion of aliens from the practice of law violates equal protection, and classifications based on alienage are inherently suspect and subject to strict scrutiny).

III. Traditional Constitutional Doctrine Regarding Voting and Candidacy

The elaborate restrictions that frustrated popular participation in the electoral process were styled "qualifications" and were included in most state constitutions in the eighteenth and nineteenth centuries. The qualifications established in the early state constitutions set a pattern generally followed by new states as they were admitted to the Union and by cities and counties adopting charters under "home rule" legislation.

Some of the harshest restrictions of the franchise in the original state constitutions were diluted by various states even prior to the adoption of the Federal Constitution. Thus, Governor Morris' proposal at the Federal Constitutional Convention "to restrain the right of suffrage to freeholders" was defeated, *inter alia,* because elections in Philadelphia, New York, and Boston "where the Merchants, & Mechanics vote are at least as good as those made by freeholders only . . . . The people have been long accustomed to this right in various parts of America, and will never allow it to be abridged."[57] Many of the restrictive state qualifications, however, survived in original or modified form until the 1960's. Some of them, such as restrictions on political candidacy by age or lengthy state or local durational residency requirements, still are rigorously enforced. State restrictions on participation in state elections were, until very recently, shielded from federal judicial scrutiny.

The doctrine of *Minor v. Happersett,*[58] that the "Constitution of the United States does not confer the right of suffrage upon any one," prevailed until *Baker v. Carr*[59] was decided in 1962. In 1874, the Court in *Minor* held that the right to vote was not conferred upon citizens of the United States by the privileges and immunities clause[60] or the due process clause of the fourteenth amendment,[61] nor by the clause which guarantees to every state a republican form of government.[62]

In *Pope v. Williams*[63] the Court relied upon *Minor* to uphold a Maryland law requiring persons entering the state to make a declaration of their intent to become citizens and residents of the state at least one year before they registered to vote. In *Pope* the Court held that the one-year waiting period did not deny equal

[57] 2 Records, *supra* note 14, at 216 (remarks of Mr. Gorham from Massachusetts).

[58] 88 U.S. (21 Wall.) 162, 178 (1874).

[59] 369 U.S. 186, 226 (1962).

[60] 88 U.S. (21 Wall.) at 171.

[61] *Id.* at 175.

[62] *Id.* at 175-77.

[63] 193 U.S. 621 (1904).

protection, nor was it repugnant to any fundamental rights or implied guaranties of the Federal Constitution. The Court stated that the "privilege to vote in any State is not given by the Federal Constitution, or by any of its amendments."[64] Under the traditional doctrine, voting was not "a privilege springing from citizenship of the United States."[65] The question of "whether the conditions prescribed by the State might be regarded by others as reasonable or unreasonable is not a Federal one."[66] Thus, the Court concluded that

> the privilege to vote in a State is within the jurisdiction of the State itself, to be exercised as the State may direct, and upon such terms as to it may seem proper, *provided, of course, no discrimination is made between individuals in violation of the Federal Constitution.*[67]

In *Snowden v. Hughes*[68] the Court once again hewed to the line set in *Minor* and *Pope*. The *Snowden* Court declined to consider whether a claim arose under the Civil Rights Act for the unlawful refusal of state officials to place the name of a nominated candidate on the ballot. The *Snowden* Court adhered to the view that the "right to become a candidate for state office, like the right to vote for the election of state officers, . . . is a right or privilege of state citizenship, not of national citizenship . . . ."[69] The equal protection claim in *Snowden* was not grounded upon facial invalidity of a state statute but, rather, on the unlawful denial of a right conferred by state law.[70] *Snowden* is the high water mark of federal indifference to the rights of political candidacy, as are *Minor* and *Pope* of voting rights. Since the right to vote or to be a candidate were incidents of state and not of national citizenship, even the unlawful denial of these rights did not establish a federal claim.

The view that the Constitution did not confer rights of voting and political candidacy in state elections upon anyone has deep roots in American constitutional history. Under the Constitution as originally adopted, the qualifications for candidacy in federal elections were specifically prescribed and, therefore, were fed-

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[64] *Id.* at 632.

[65] *Id.*

[66] *Id.* at 633.

[67] *Id.* at 632 (emphasis added). This qualification has occasionally been relied on to sanction federal protection of electoral rights. *See, e.g.*, Bolanowski v. Raich, 330 F. Supp. 724, 727-28 (E.D. Mich. 1971). *But cf.* Snowden v. Hughes, 321 U.S. 1, 7-8 (1944); Pope v. Williams, 193 U.S. 621 (1904). It is obvious, however, that the Court in *Pope* and *Snowden* did not intend its qualification to be given such an expansive interpretation.

[68] 321 U.S. 1 (1944).

[69] *Id.* at 7.

[70] *Id.* at 7-8.

eralized.[71] Voting in federal elections, however, was left in state hands,[72] subject to Congressional change.[73] The original Constitution was silent as to voting or candidacy in state elections, unless it can be said that such rights were secured to United States citizens by the original privileges and immunities clause.[74] Under the "fundamental rights" interpretation of article IV, section 2 of the Constitution, "the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised" was considered a privilege of United States citizenship.[75] But state autonomy over the electoral process was deeply ingrained by the time of the Civil War.[76] The fifteenth amendment secured the right to vote without regard to race—the first setback for state electoral autonomy. The nineteenth amendment's establishment of the right to vote without regard to sex constituted another federal incursion. And, more recently, the twenty-sixth amendment has established the right to vote of all persons eighteen years of age or over. But the *Minor-Pope-Snowden* doctrine of federal indifference to the state electoral process, except as to race or sex, prevailed until the 1960's when the Warren Court used the equal protection clause to slice away some of the more egregious exclusionary state electoral practices.

Baker v. Carr[77] sounded the death knell of the traditional doctrine. Although *Baker* did not expressly overrule the *Minor-Pope-Snowden* doctrine, it unceremoniously relegated *Minor* to a footnote discussing the guaranty clause.[78] Less than a decade after *Baker* had apparently laid the *Minor-Pope-Snowden* rationale to rest, however, the doctrine ostensibly came to life, albeit briefly, in *Oregon v. Mitchell.*[79] Mr. Justice Black's opinion for the five-member majority validated the 1970 Voting Rights Act Amendments enfranchising eighteen-year-olds in federal elections, abol-

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[71] U.S. CONST. art. I, § 2, cl. 2 (House of Representatives); *id.* § 3, cl. 3 (Senate); *id.* art. II, § 1, cl. 4 (President).

[72] *Id.* art. I, § 2, cl. 1. Popular election of Senators was not required until the adoption of the seventeenth amendment in 1913, which likewise required that the "electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures." *Id.* amend. XVII.

[73] *Id.* art. I, § 4, cl. 1.

[74] *Id.* art. IV, § 2, cl. 1.

[75] Corfield v. Coryell, 6 F. Cas. 546, 551-52 (No. 3,230) (C.C.E.D. Pa. 1823). *See also* J. TEN BROEK, THE ANTI-SLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT (1951). It is difficult to conceive of voting as a fundamental or inviolable right, if it is properly subject to whatever unreasonable exclusions state laws and constitutions may attach to it.

[76] *See e.g.*, Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

[77] 369 U.S. 186 (1962).

[78] *Id.* at 222 n.48.

[79] 400 U.S. 112, 125 (1970) (5-4 decision).

ishing literacy tests as a prerequisite to voting, and abolishing state durational residency requirements in excess of thirty days in presidential elections. The Court, however, invalidated the amendment enfranchising eighteen-year-olds in state and local elections. Mr. Justice Black restated the traditional doctrine that state control over state elections is exclusive and not subject to congressional regulation under section five of the fourteenth amendment.

The upshot of the Court's apparent reversion to the traditional doctrine of state electoral autonomy was the swift enactment of the twenty-sixth amendment. *Minor* and *Pope* were cited approvingly by Mr. Justice Black in *Mitchell.* But, aside from *Mitchell,* the traditional doctrine appears to have been consumed in the past twelve years by its exception—namely, that federal relief is available to redress state denial of constitutional rights as applied to voting and political candidacy. *Mitchell* could be viewed as the modern apogee of the Court's refusal in election cases to recognize that "[n]otions of what constitutes equal treatment for purposes of the Equal Protection Clause *do* change."[80] The Court's holding in *Mitchell* as it related to age requirements for voting in state and local elections was mooted by the enactment of the twenty-sixth amendment. And since only three of the five-member *Mitchell* majority still serve,[81] its continuing validity is doubtful. The swift enactment of the twenty-sixth amendment unmistakably demonstrated a repudiation of the traditional state electoral autonomy doctrine of *Minor, Pope,* and *Snowden. Mitchell* reflects an accurate recognition of the lack of judicially manageable standards for determining a permissible age for voting in state elections.

IV. Voting as a Federally Secured Right

Baker v. Carr[82] was one of those rare watershed cases that gave issue to a new line of authority. It marked the point of departure for courts in securing a federal right of political participation. Since *Baker* was decided in 1962, the Supreme Court repeatedly has struck down significant intrusions on the equal right of all citizens to participate meaningfully in the political process, subject, of course, to reasonable state and federal regulation. Slowly, at first, then surely, and then swiftly, the courts and Congress moved against discrimination in the electoral process.

[80]Harper v. Virginia Bd. of Elections, 383 U.S. 663, 669 (1966) (emphasis in original).

[81]Justices Black and Harlan have been replaced by Justices Rehnquist and Powell.

[82]369 U.S. 186 (1962).

The first efforts were directed at securing equal political rights of Blacks. But, beginning in 1962, the battle was extended to other fronts. The protected classes now include such diverse groups as minority political parties, the poor, persons not owning property, special occupational groups such as military or government employees, urban voters, qualified voters in state confinement, voters changing their party affiliation, and recent migrants from other states. Since restrictions on candidacy dilute the range of voter choice, and thus impair the effectiveness of voting rights, the invalidation of an exclusionary classification on voting should, at least, render that classification suspect as applied to candidacy because of the reciprocal relationship between voting and candidacy.

Restrictions on Racial Minorities—To secure their political rights, Blacks have been forced to struggle against grandfather clauses,[83] exclusion from political parties on racial grounds,[84] literacy tests,[85] barriers to registration,[86] gerrymandering,[87] and outright fraud and intimidation.[88] Securing the right to vote was but the first step toward political equality. As the right to vote, grudgingly yielded at first, became firmly established, a new generation of leadership looked increasingly to political candidacy to secure their rights. They were met, however, with substantial barriers to candidacy,[89] including more sophisticated methods of discrimination—exclusionary filing fees,[90] complicated indirect election laws, racially neutral on their face,[91] and, in some cases, durational residency requirements.[92] Significantly, the right to be a candidate—the right to a place on the ballot without regard to race—was vindicated as a logical corollary of the right to vote.[93]

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[83]Guinn v. United States, 238 U.S. 347 (1915).

[84]*See, e.g.*, Smith v. Allwright, 321 U.S. 649 (1944); Nixon v. Condon, 286 U.S. 73 (1932); Nixon v. Herndon, 273 U.S. 536 (1927).

[85]Oregon v. Mitchell, 400 U.S. 112 (1970); South Carolina v. Katzenbach, 383 U.S. 301 (1966).

[86]United States v. Mississippi, 380 U.S. 128 (1965), *on remand*, 256 F. Supp. 344 (S.D. Miss. 1966); *cf.* United States v. Louisiana, 265 F. Supp. 703 (E.D. La. 1966), *aff'd per curiam*, 386 U.S. 270 (1967).

[87]Gomillion v. Lightfoot, 364 U.S. 339 (1960).

[88]United States v. Classic, 313 U.S. 299 (1941).

[89]*See, e.g.*, Hadnott v. Amos, 394 U.S. 358 (1969).

[90]Jenness v. Little, 306 F. Supp. 925 (N.D. Ga. 1969), *appeal dismissed sub nom.*, Matthews v. Little, 397 U.S. 94 (1970).

[91]Turner v. Fouche, 396 U.S. 346 (1970).

[92]Walker v. Yucht, 352 F. Supp. 85 (D. Del. 1972), *stay granted*, No. A-458, U.S., Oct. 31, 1972 (Brennan, J.). The plaintiff, Rev. Jessee Walker, was a Negro who, like many others of his race, had recently migrated from the South to the urban North.

[93]Jenness v. Little, 306 F. Supp. 925, 926-27 (N.D. Ga. 1969), *appeal dismissed sub nom.*, Matthews v. Little, 397 U.S. 94 (1970).

In 1965 and again in 1970, Congress in the Voting Rights Acts struck a decisive blow at the last major, formal vestiges of racial discrimination in the electoral process.[94]

Vote-Weighting Restrictions—In *Baker* the Court for the first time entered the political thicket of reapportionment which it had earlier shunned.[95] Reapportionment, as the Court's experience shows, "presented a tangle of partisan politics in which geography, economics, urban life, rural constituencies, and numerous other nonlegal factors play varying roles."[96] The Court observed that judicially manageable standards to effectuate its "one-person/one-vote" decree were provided by the "well developed and familiar" standards of the equal protection clause.[97] The Court reasoned that "it has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects *no* policy, but simply arbitrary and capricious action."[98] Thus, applying the traditional equal protection standard, the Court held that the voters' claim against a malapportioned Tennessee legislature was justiciable and, if true, presented a claim within reach of judicial protection under the fourteenth amendment.[99] This principle was soon extended to numerous other cases. The weighting of rural votes more heavily than urban votes and the weighting of the votes of some small rural counties more heavily than other larger rural counties were held to violate the equal protection clause.[100] Likewise, the unequal weighting of votes through bicameralism in state legislatures[101] and in state delegations to the United States House of Representatives[102] were held to violate the equal protection clause.

Restrictions on Minority Political Parties—The right to vote is "heavily burdened if that vote may be cast only for one of two parties at a time when other parties are clamoring for a place on the ballot."[103] Likewise, filing fees, as applied to indigents without an alternative means of ballot access, infringe the

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[94]The Voting Rights Act of 1965, 42 U.S.C. §§ 1973 *et seq.* (1970), was interpreted and its constitutionality upheld in South Carolina v. Katzenbach, 383 U.S. 301 (1966). The extension of the 1965 literacy test provisions in the 1970 Amendments to outlaw literacy tests throughout the United States was upheld in Oregon v. Mitchell, 400 U.S. 112 (1970).

[95]*See* Colegrove v. Green, 328 U.S. 549 (1946).

[96]Oregon v. Mitchell, 400 U.S. 112, 138 (1970) (Douglas, J., dissenting).

[97]Baker v. Carr, 369 U.S. 186, 226 (1962).

[98]*Id.* (emphasis in original).

[99]*Id.* at 237.

[100]Gray v. Sanders, 372 U.S. 368 (1963).

[101]Reynolds v. Sims, 377 U.S. 533 (1964).

[102]Wesberry v. Sanders, 376 U.S. 1 (1964).

[103]Williams v. Rhodes, 393 U.S. 23, 31 (1968).

right to vote as well as the individual rights of impecunious aspirants for public office.[104] Indeed, *Williams v. Rhodes*,[105] *Bullock v. Carter*,[106] and *Lubin v. Panish*[107] attach substantial, if not primary, importance to the right of candidacy as a correlative of the right to vote. The "number of voters in favor of a party is relevant in considering whether state laws violate the Equal Protection Clause."[108]

Restrictions on Change of Parties—Legislation which " 'locks' voters into a pre-existing party affiliation from one primary to the next [when] . . . the only way to break the 'lock' is to forego voting in *any* primary for a period of [twenty-three months]" infringes the right of "free political association."[109] However, states can require that a voter register as a party member thirty days prior to the previous general election—a date eight months prior to the presidential primary and eleven months prior to the non-presidential primary—to be eligible to vote in a party primary.[110] The difference in outcome between *Rosario v. Rockefeller*[111] and *Kusper v. Pontikes*[112] is one of degree, of "line-drawing." New York's eleven-month waiting period in *Rosario* advanced the legitimate state interest of maintaining the integrity of the political process by preventing interparty raiding. The Court in *Kusper* was unconvinced that Illinois' twenty-three-month period was "an essential instrument to counter the evil at which it was aimed."[113] Although in *Storer v. Brown*,[114] a one-year restriction on change of parties by candidates was found to be reasonable, a restriction of two years or longer would probably be invalid because of its impact in locking a candidate into his pre-existing party affiliation.[115]

Occupational Restrictions—There is no indication that occupation affords "a permissible basis for distinguishing between qualified voters within the State."[116] Thus, in *Carrington v. Rash*,[117] the Supreme Court struck down a conclusive presump-

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[104]*See* Lubin v. Panish, 415 U.S. 709 (1974); Bullock v. Carter, 405 U.S. 134 (1972).

[105]393 U.S. 23 (1968).

[106]405 U.S. 134 (1972).

[107]415 U.S. 709 (1974).

[108]Williams v. Rhodes, 393 U.S. 23, 34 (1968).

[109]Kusper v. Pontikes, 414 U.S. 51, 61 (1973).

[110]Rosario v. Rockefeller, 410 U.S. 752 (1973).

[111]410 U.S. 752 (1973).

[112]414 U.S. 51 (1973).

[113]Storer v. Brown, 415 U.S. 724, 732 (1974).

[114]415 U.S. 724 (1974).

[115]*Cf.* Kusper v. Pontikes, 414 U.S. 51 (1973).

[116]Gray v. Sanders, 372 U.S. 368 (1963).

[117]380 U.S. 89 (1965).

tion that persons moving to Texas while on military duty could never vote in state elections so long as they were members of the armed forces.[118] The State asserted an interest in "immunizing its elections from the concentrated balloting of military personnel, whose collective voice may overwhelm a small local civilian community."[119] The *Carrington* Court responded, however, that the right to vote is " 'so vital to the maintenance of democratic institutions' . . . [that it] cannot constitutionally be obliterated because of a fear of the political views of a particular group of bona fide residents."[120] The Court concluded that " '[f]encing out' from the franchise a sector of the population because of the way they may vote is constitutionally impermissible."[121]

In *Carrington,* Texas also asserted a state "interest in protecting the franchise from infiltration by transients."[122] *Carrington* demonstrates that no valid state interest is served by excluding bona fide residents from the political process, and that the legitimate state interest in restricting political participation to bona fide residents can be protected by means less dramatic and overreaching than a conclusive presumption of the nonresidency of persons moving to Texas as members of the Armed Forces. Mere declarations by voters of their intent to vote in a state or county "is often not conclusive; the election officials may look to actual facts and circumstances."[123] *Carrington* establishes that civilian durational residency as a conclusive presumption of bona fide residency imposes "an invidious discrimination in violation of the Fourteenth Amendment."[124] Every state "is free to take reasonable and adequate steps . . . to see that all applicants for the vote actually fulfill the requirements of bona fide residence."[125] Bona fide residency of voters advances the compelling state interest that those who live in an area have an equal voice in the election of public officials. As applied to candidacy, a bona fide residence qualification appears carefully tailored to advance the compelling state interest in the accessibility and accountability of public elected officers—both of which are vital to a democratic system.[126]

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[118] *Id.* at 89-90 n.1.

[119] *Id.* at 93.

[120] *Id.* at 94.

[121] *Id.*

[122] *Id.* at 93.

[123] *Id.* at 95.

[124] *Id.* at 96.

[125] *Id. Accord,* Hadnott v. Amos, 320 F. Supp. 107, 119-23 (M.D. Ala. 1970), *aff'd mem.*, 401 U.S. 968 (1971). *Cf.* Williams v. North Carolina, 325 U.S. 226, 235-36 (1945).

[126] Query whether a bona fide residency qualification for administrative

In *Evans v. Cornman*,[127] Montgomery County, Maryland, registration officials sought to deny the vote to persons living on the premises of the National Institute of Health, a federal reservation within the county.[128] The Court noted the "vital ways in which NIH residents are affected by electoral decisions."[129] Among these were criminal laws, state spending and taxing decisions, unemployment and workmen's compensation laws, automobile legislation, jurisdiction of state courts, and matters relating to Maryland public schools. The sole interest or purpose asserted by the State was "to insure that only those citizens who are primarily or substantially interested in or affected by electoral decisions have a voice in making them."[130] The Court invalidated the exclusion on equal protection grounds. After *Evans*, it is plain that states cannot fence off otherwise qualified bona fide state residents and deny them their right to vote.[131] By analogy, comparable restrictions on candidacy would be suspect.[132]

Property Ownership and Wealth Restrictions—In *Kramer v. Union Free School District*,[133] the Court invalidated a property ownership restriction of the suffrage. The State of New York restricted the franchise in certain school board elections to owners or lessees of taxable real property and their spouses, or to parents or guardians of enrolled children. The State attempted to justify this restriction with the argument that "increasing complexity . . . make[s] it extremely difficult for the electorate fully to understand the whys and wherefores of the detailed operations of the school system."[134] The State further contended that many communications of the school boards and school administrations in New York were "sent home to the parents through . . . pupils and [were] 'not broadcast to the general public;' thus, nonparents [were] less informed than parents."[135] The State argued that taxpayers had "enough of an interest 'through the burden on their pocketbooks,' to acquire such information as they may need."[136] New York maintained that it had a "legitimate interest . . . in restricting a voice in school matters to those 'directly affected'

officers not subject to popular election would not intrude too significantly on the right to travel to be permitted?

[127]398 U.S. 419 (1970).

[128]*Id.* at 419-20.

[129]*Id.* at 424.

[130]*Id.* at 422.

[131]*Id.* at 426.

[132]*Compare, e.g.*, Evans v. Cornman, 398 U.S. 419 (1970), *with* Turner v. Fouche, 396 U.S. 346 (1970).

[133]395 U.S. 621 (1969).

[134]*Id.* at 631.

[135]*Id.*

[136]*Id.*

by such decisions."[137] The Court in *Kramer* did not reach the question of whether the State, in some circumstances, might limit the exercise of the franchise to those "primarily interested" or "primarily affected," because the challenged exclusion did not meet the equal protection test that "all those excluded . . . [be] in fact substantially less interested or affected than those the statute includes."[138] The Court invalidated the New York statute because the classification did not meet the "exacting standard of precision" required of statutes which selectively distribute the franchise.[139] The State failed to offer "any justification for the exclusion of seemingly interested and informed residents."[140]

Until recently, Louisiana permitted "only property taxpayers to vote in utility bond elections."[141] In *Cipriano v. City of Houma*,[142] it was argued that the state interest purportedly served by the Louisiana statute was that

> property owners have a "special pecuniary interest" in the election because the efficiency of the utility system directly affects "property and property values" and thus "the basic security of their investment in [their] property [is] at stake."[143]

At the time of the election contested in *Cipriano*, only about forty percent of the city's registered voters were property taxpayers.[144] The Court observed, however, that the operation of the utility systems "affects virtually every resident of the city, nonproperty owners as well as property owners."[145] The Louisiana statute was held violative of the equal protection clause because it irrationally excluded from voting nonproperty owners with an equal stake in the outcome of bond elections.[146] The property ownership decisions in the context of voting and candidacy plainly illustrate the applicability of the logic of voting cases involving candidacy.[147]

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[137] *Id.*

[138] *Id.* at 632.

[139] *Id.* at 633. The New York law allowed the vote to "many persons who have, at best, a remote and indirect interest in school affairs, and, on the other hand exclude[d] others who have a distinct and direct interest in the school meeting decisions." *Id.* at 632.

[140] *Id.* at 633.

[141] Cipriano v. City of Houma, 395 U.S. 701, 704 n.4 (1969).

[142] 395 U.S. 701 (1969).

[143] *Id.* at 704.

[144] *Id.* at 705.

[145] *Id.* "Property owners, like nonproperty owners, use the utilities and pay the rates; however, the impact of the revenue bond issue on [property owners] is unconnected to their status as property taxpayers." *Id.*

[146] *Id. Accord*, City of Phoenix v. Kolodziejski, 399 U.S. 204 (1970).

[147] *Compare, e.g.*, Turner v. Fouche, 396 U.S. 346 (1970), *with* City of Phoenix v. Kolodziejski, 399 U.S. 204 (1970), *and* Cipriano v. City of Houma,

In *Harper v. Virginia Board of Elections,*[148] the Court invalidated a state poll tax which operated as a precondition to voting. The poll tax significantly intruded upon the right to vote, and classified voters on the basis of wealth. Here, too, the applicability of the logic of voting cases to candidacy cases has been demonstrated.[149]

Location—The Court recently held in *O'Brien v. Skinner*[150] that otherwise qualified voters in state confinement cannot be denied the right to vote, at least when absentee ballots are made available to other persons unable to reach the polls.

V. Political Candidacy as a Federally Secured Right

The emergence of a limited, federally secured right of political candidacy is one of the most significant recent public law developments. Although largely a creation of the past six years, the once protean contours of this right have now received sufficient judicial definition to merit critical recapitulation and examination. The right to be a candidate issues from two distinct but related sources. It wells derivatively from the right to vote, since restrictions on candidacy have an obvious impact upon the right to cast a meaningful vote for the candidate of one's choice. The right springs directly from the right of political association protected by the first and fourteenth amendments. The confluence of voting rights and the right of political association has thus given rise to a new but mighty tributary to the mainstream of fundamental American political freedoms. As this right is more clearly delineated over the years, it promises a sure, if not swift, passage toward a more democratic society for the United States. Significantly, courts now recognize that limitations on the ability of candidates to obtain a position on the ballot burden "two different, although overlapping, kinds of rights—the right of individuals to associate for the advancement of political beliefs, and the rights of qualified voters, regardless of their political persuasion, to cast their votes effectively."[151]

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395 U.S. 701 (1969), *and* Kramer v. Union Free School Dist., 395 U.S. 621 (1969).

[148]383 U.S. 663 (1966).

[149]*Compare, e.g.*, Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966), *with* Lubin v. Panish, 415 U.S. 709 (1974), *and* Bullock v. Carter, 405 U.S. 134 (1972).

[150]414 U.S. 524 (1974). *Cf.* Goosby v. Osser, 409 U.S. 512 (1973); McDonald v. Board of Election Comm'rs, 394 U.S. 802 (1969).

[151]Williams v. Rhodes, 393 U.S. 23, 30 (1968).

A. *Right of Association*

Candidacy for public office is intimately related to the freedoms of speech and assembly protected by the first amendment. In *NAACP v. Button*,[152] the freedom to associate with others for the common advancement of political beliefs and ideas was recognized as a form of "orderly group activity" protected by the first and fourteenth amendments. The first amendment's right of association protects "vigorous advocacy."[153] As a "form of political expression,"[154] candidacy for public office would appear even more central than the advocacy of litigation to secure the constitutional rights of Blacks vindicated in *Button*. Because first amendment freedoms "need breathing space to survive, government may regulate in the area only with narrow specificity."[155] Accordingly, significant intrusions on the "delicate and vulnerable" associational rights protected by the first amendment call for strict scrutiny.[156]

If the freedom of association for the purpose of advancing ideas and airing grievances throws a cloak of inviolability on the privacy of membership lists of groups espousing dissident beliefs,[157] then, a fortiori, it must extend to public advocacy in political campaigns. To be sure, there are differences between constitutionally protected advocacy and political candidacy. Freedom of speech and association do not automatically guarantee a place on the ballot. The Constitution entrusts the administration of the electoral process primarily to the states. Reasonable regulation of access to the ballot is essential if elections "are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes."[158] Thus, political participation is subject to reasonable state regulation for the protection of multifarious, legitimate state interests. For example, a state can protect the integrity of its system of primary elections by laws aimed at "raiding"[159] and can require that minor political parties demonstrate some reasonable quantum of voter support to obtain a place on the ballot.[160] But the thesis of this Article and the

[152]371 U.S. 415 (1963). *Cf.* UMW, Dist. 12 v. Illinois State Bar Ass'n, 389 U.S. 217 (1967).

[153]371 U.S. at 429.

[154]*Id.*

[155]*Id.* at 433.

[156]*Id.*

[157]Bates v. City of Little Rock, 361 U.S. 516, 522-33 (1960); NAACP v. Alabama, 357 U.S. 449, 460-61 (1958).

[158]Storer v. Brown, 415 U.S. 724, 730 (1974). *Cf.* Rosario v. Rockefeller, 410 U.S. 752 (1973). *But see* Kusper v. Pontikes, 414 U.S. 51, 61 (1973).

[159]Storer v. Brown, 415 U.S. 724, 731 (1974).

[160]*See, e.g.*, American Party v. White, 415 U.S. 767 (1974); Jenness v. Fortson, 403 U.S. 431, 439 (1971).

thrust of recent Supreme Court decisions is that state infringement of basic constitutional protections is impermissible as applied to *candidacy* as well as to *voting*. Certainly, not every restriction on political candidacy is of constitutional dimensions. But when fundamental constitutional values are jeopardized, there is then a qualified right to be a candidate.

B. Exclusion of Minority Parties and Candidates

The freedom of association, long protected by the first amendment, includes the "right to form a party for the advancement of political goals."[161] The right to be a candidate would mean "little if a party can be kept off the election ballot and thus denied an equal opportunity to win votes."[162] For example, in *Williams v. Rhodes*,[163] the Court invalidated restrictive Ohio legislation that made it impossible for electors committed to Governor George Wallace to obtain a place on the 1968 ballot.[164] The restrictive provisions were considered invidious on at least three grounds: they made it "virtually impossible for any party to qualify except the Democratic and Republican Parties,"[165] the two major parties faced "substantially smaller burdens" to obtain ballot position than independent parties,[166] and Ohio laws made "no provision for ballot position for independent *candidates* as distinguished from political parties."[167] As a result, the Court declared that "the totality of the Ohio restrictive laws taken as a whole imposes a burden on voting and associational rights which we hold is an invidious discrimination, in violation of the Equal Protection Clause."[168]

Williams put to rest any lingering doubts about the applicability of federal constitutional guarantees to political candidacy.[169] The Court observed that the "extensive power" of states over state elections has been "always subject to the limitation that they not be exercised in a way that violates other specific provisions of the Constitution."[170] The Court held that "no state

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[161]Williams v. Rhodes, 393 U.S. 23, 31 (1968).

[162]*Id.*

[163]393 U.S. 23 (1968).

[164]Although Wallace partisans obtained 450,000 signatures on petitions—more than the fifteen percent required by Ohio for a place on the ballot—the Independent Party did not meet the early deadline for filing the primary election petitions as required by the detailed and rigorous standards of Ohio laws. *Id.* at 26-27.

[165]*Id.* at 25.

[166]*Id.* at 25-26.

[167]*Id.* at 26 (emphasis added).

[168]*Id.* at 34.

[169]*See* text at section III *infra*.

[170]393 U.S. at 29.

can pass a law regulating elections that violates the Fourteenth Amendment's [equal protection clause] . . . ."[171]

Williams made it clear that "the Equal Protection Clause does not make every minor difference in the application of laws to different groups a violation of our Constitution."[172] The Court articulated a standard appropriate for determining whether or not a state law violates the equal protection clause: "we must consider the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification."[173] Because the restrictive Ohio legislation imposed "such unequal burdens on minority groups," the Court stated that only a compelling state interest could justify the state regulations.[174] The Court concluded that Ohio had "failed to show any 'compelling interest' which justified imposing such heavy burdens on the right to vote and to associate."[175]

Since *Williams* plainly established the qualified right to be a political candidate, states may no longer totally exclude independent candidates from the ballot.[176] Nor can they impose substantially heavier burdens on independent candidates to obtain ballot position than are imposed on major parties or their candidates.[177] *Williams* also demonstrates that the confluence of associational and voting rights can be of sufficient constitutional dimension to trigger strict scrutiny of state restrictions on the right to be a candidate.

In *Jenness v. Fortson,*[178] the Court re-examined *Williams* in some detail and approved a Georgia law that conditioned an independent candidate's access to the ballot on filing a nominating petition signed by not less than five percent of those eligible to vote for the office he is seeking.[179] In contrast to the Ohio statutory scheme considered in *Williams,* the Georgia election law "in no way [froze] the status quo, but implicitly [recognized] the potential fluidity of American political life."[180] The Georgia law presented a statutory scheme "vastly different" from the one before the Court in *Williams,* since Georgia freely provided for write-in votes, fully recognized independent candidacies, did not fix an unreasonable filing deadline for independents, and did not

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[171] *Id.*
[172] *Id.* at 30.
[173] *Id.*
[174] *Id.* at 31.
[175] *Id.*
[176] *See* text accompanying notes 165 & 167 *supra.*
[177] *See* text accompanying note 166 *supra.*
[178] 403 U.S. 431 (1971).
[179] *Id.* at 432.
[180] *Id.* at 439.

require independent candidates or small parties to establish elaborate election machinery.[181] The Court concluded:

> There is surely an important state interest in requiring some preliminary showing of a significant modicum of support before printing the name of a political organization's candidate on the ballot—the interest, if no other, in avoiding confusion, deception, and even frustration of the democratic process at the general election.[182]

The *Jenness* Court did not state what standard it applied to determine the validity of the Georgia law. Apparently, however, it used the traditional reasonable basis test because the Georgia restriction on candidacy and voting did not significantly intrude on fundamental interests of political candidates and was reasonably related to important state interests.

The *Williams-Jenness* rationale recently has been amplified in *Storer v. Brown*[183] and *American Party v. White*.[184] In *Storer* the Court upheld a California law denying ballot status as an independent to candidates who had voted in an immediately preceding partisan primary or who had a registered affiliation with a qualified political party at any time within one year prior to the immediately preceding primary election.[185] The Court observed that there is no "litmus-paper test for separating those restrictions that are valid from those that are invidious under the Equal Protection Clause."[186] The rules are "not self-executing," the judgments that must be made are "hard" ones, and the result of the process in any specific case "may be very difficult to predict with great assurance."[187] As applied to two of the appellants, the Court's holding in *Storer* closely followed the *Jenness* pattern. The *Storer* Court observed that it had "never been suggested that the *Williams-Kramer-Dunn* rule automatically invalidates every substantial restriction on the right to vote or associate."[188] The California statute was reasonably related to "the States' strong interest in maintaining the integrity of the political process by preventing interparty raiding."[189] Importantly, the Court also observed that "[o]ther variables must be considered where qualifications for *candidates* rather than for *voters* are at issue."[190] The "other variables" obviously comprehend the legitimate state

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[181] *Id.* at 438.
[182] *Id.* at 442.
[183] 415 U.S. 724 (1974).
[184] 415 U.S. 767 (1974).
[185] 415 U.S. at 726.
[186] *Id.* at 730.
[187] *Id.*
[188] *Id.* at 729.
[189] *Id.* at 731.
[190] *Id.* at 732 (emphasis added).

interests delineated in *Jenness* and *Bullock v. Carter*.[191] The Court supported the reasonableness of the one-year California waiting period on the authority of *Rosario v. Rockefeller*,[192] in which the Court approved an eleven-month waiting period for voters who wanted to change parties. The Court's reasoning in *Storer*, as applied to the two appellants, proceeded along *Jenness* lines. However, the Court held that the one-year disaffiliation provision was "not only permissible but *compelling* and . . . [outweighed] the interest the candidate and his supporters may have [had] in making a late rather than an early decision to seek independent ballot status."[193]

With respect to two other appellants, the Court vacated the district court's judgment and remanded the case for further proceedings. Both had satisfied the one-year disaffiliation provision.[194] California law required that an independent candidate for President file a petition signed by five percent of the total number of votes cast in the last general election which, the Court stated, "[did] not appear to be excessive."[195] However, the petition signatures must have been obtained over a twenty-four-day period between the primary and general election. The Court was concerned by the fact that signature gathering had to await the conclusion of the primary and by the possibility that the available pool of possible signers, after eliminating the total primary vote, might have constituted a substantially larger percentage of the eligible pool than the five percent approved in *Jenness*.[196] The "inevitable question for judgment" on remand, therefore, was whether "a reasonably diligent independent candidate [could] be expected to satisfy the signature requirements . . . ."[197] The Court observed that there is

> no sufficient state interest in conditioning ballot position for an independent candidate on his forming a new political party as long as the State is free to assure itself that

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[191]405 U.S. 134 (1972). *Bullock* recognized that a State has a "legitimate interest in regulating the number of candidates on the ballot . . . . [and in] protect[ing] the integrity of its political processes from frivolous or fraudulent candidacies." *Id.* at 145.

[192]410 U.S. 752 (1973). *But cf.* Kusper v. Pontikes, 414 U.S. 51 (1973) (twenty-three month waiting period to change parties invalidated).

[193]415 U.S. at 736 (emphasis added). *See* American Party v. White, 415 U.S. 767 (1974), in which the Court, citing *Storer*, stated that the validity of qualifications for ballot position which intrude on the right of association or discriminate against minority parties depends "upon whether they are necessary to further compelling state interests." *Id.* at 780.

[194]415 U.S. at 738.

[195]*Id.*

[196]*Id.* at 743-44.

[197]*Id.* at 742.

> the candidate is a serious contender, truly independent and with a satisfactory level of community support.[198]

Independent candidates cannot be forced to surrender their independent status and choose the "political party route . . . to appear on the ballot in the general election."[199]

In *American Party v. White*[200] the Court disapproved the Texas practice of limiting names on absentee ballots to the two major established political parties.[201] It sustained Texas laws requiring, as a condition of ballot access by independent parties, a petition containing signatures equal to one percent of the total vote cast for governor in the last preceding election.[202] The Court believed that the one percent support requirement fell "within the *outer boundaries* of support the State may require before according political parties ballot position"[203] and satisfied compelling state interests.[204]

The right to be a candidate recognized in *Williams* was solidified by *Jenness*, *Storer*, and *American Party*. The right to be a candidate extends to every otherwise qualified person who can satisfy reasonable state requirements relating to a required quantum of voter support. The state interest in limiting the ballot to candidates with a "significant modicum of support"[205] avoids confusion, deception, and frustration of the democratic process and thereby serves compelling state interests. Any other restrictions on access to the ballot by candidates demonstrating a significant modicum of support would be subject to the Court's close scrutiny and would be justified only if they were precisely related to their purpose and served a compelling state interest.

C. Property Ownership Restrictions on Candidacy

In *Turner v. Fouche*[206] the Supreme Court held that a Georgia freeholder requirement for school board membership denied equal protection because "the challenged classification rests on grounds wholly irrelevant to the achievement of a valid state objective."[207] It observed that there is "a federal constitutional right to be con-

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[198] *Id.* at 746.

[199] *Id.*

[200] 415 U.S. 767 (1974).

[201] *Id.* at 795. *Cf.* O'Brien v. Skinner, 414 U.S. 524 (1974); Goosby v. Osser, 409 U.S. 512 (1973).

[202] 415 U.S. at 777.

[203] *Id.* at 783 (emphasis added).

[204] *Id.* at 780-81.

[205] *Id.* at 782 n.14, *quoting from* Jenness v. Fortson, 403 U.S. 431, 442 (1971).

[206] 396 U.S. 346 (1970).

[207] *Id.* at 362.

sidered for public service without the burden of invidiously discriminatory disqualifications."[208] The Court was unable to discern any legitimate state interest in the Georgia freeholder qualification for office since eighty-five percent of the Taliferro County school budget was derived from sources other than the Board's levy on real property, and because "lack of ownership of realty [does not] establish a lack of attachment to the community and its educational values."[209] Therefore, the Court applied the traditional test of equal protection and invalidated the challenged classification as "wholly irrelevant to the achievement of a valid state objective."[210] Since the Georgia freeholder requirement did not meet even this test, the Court found it unnecessary to resolve the dispute occasioned by Georgia's claim that the compelling interest standard was "inapposite" because it applies to "exclusions from voting," and not to the right to be a candidate.[211] The application of the traditional test in *Turner* has apparently confused some courts which have interpreted *Turner* as precluding strict scrutiny of durational residency requirements for public office.[212] Such

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[208] *Id.*

[209] *Id.* at 364. The Court declared that the state "may not deny to some the privilege of holding public office that it extends to others on the basis of distinctions that violate federal constitutional guarantees." *Id.* at 362-63.

[210] *Id.* at 362. *Accord,* Landes v. Town of North Hempstead, 20 N.Y.2d 417, 231 N.E.2d 120, 284 N.Y.S.2d 441 (1967).

[211] 396 U.S. at 362.

[212] *See, e.g.,* Chimento v. Stark, 353 F. Supp. 1211, 1218 (D.N.H.), *aff'd mem.,* 414 U.S. 802 (1974) (Campbell, J., concurring) (seven-year state residency for governor); Walker v. Yucht, 352 F. Supp. 85, 90 (D. Del. 1972) (three-year state residency for state House of Representatives); Hayes v. Gill, 52 Hawaii 251, 259-60, 473 P.2d 872, 879 (1970) (three-year state residency for state House of Representatives); State *ex rel.* Gralike v. Walsh, 483 S.W.2d 70, 75-76 (Mo. 1972) (one-year district residency for state senator); DeHond v. Nyquist, 65 Misc. 2d 526, 318 N.Y.S.2d 650 (Sup. Ct. 1971) (three-year city residency for city board of education). *But see* Wellford v. Battaglia, 343 F. Supp. 143, 146 (D. Del. 1972), *aff'd,* 485 F.2d 1151, 1152 (3d Cir. 1973) (five-year city residency for mayor); Green v. McKeon, 335 F. Supp. 630, 632 (E.D. Mich. 1971), *aff'd,* 468 F.2d 883, 884 (6th Cir. 1972) (two-year city residency and city property ownership for city elective or appointive office); Thompson v. Mellon, 9 Cal. 3d 96, 103, 507 P.2d 628, 633, 107 Cal. Rptr. 20, 25 (1973) (two-year city residency for city council); Cowan v. City of Aspen, 509 P.2d 1269, 1273 (Colo. 1973) (three-year city residency for municipal candidates).

Durational residency requirements of one year and of six months have been upheld on the ground that they serve compelling state interests. *See* Draper v. Phelps, 351 F. Supp. 677, 681 (W.D. Okla. 1972) (six-month district residency for state House of Representatives); Hadnott v. Amos, 320 F. Supp. 107, 119, *aff'd,* 401 U.S. 968 (1971) (dictum) (one-year circuit residency for state circuit judge); Cowan v. City of Aspen, 509 P.2d 1269, 1273 (Colo. 1973) (three-year city residency for municipal candidates).

a distinction between voting and candidacy is untenable because, as in *Williams*, it disregards the often critical relationship between the two. The distinction, as a conclusive presumption, goes too far in that it precludes the careful, case-by-case balancing of competing interests anticipated by the Court in *Williams*. It also fails to accord proper respect to the rights of association implicit in political candidacy. *Williams* and *Turner* are easily reconciled: Selection of an appropriate standard of review for determining the constitutionality of various restrictions on political candidacy should follow—not precede—deliberate judicial consideration of the factual circumstances and competing interests involved in individual cases. There is no need for the Court to use "a cannon to dispose of a case that calls for no more than a popgun."[213]

D. Filing Fees as a Bar to Candidacy

In *Bullock v. Carter*[214] persons who sought to become political candidates challenged Texas party primary filing fees. The Court invalidated the filing fees because of their "patently exclusionary character."[215] Examining the fees "in a realistic light [to determine] the extent and nature of their *impact on voters*,"[216] the Court concluded that "the laws must be 'closely scrutinized'" because "the Texas filing fee scheme has a real and appreciable impact on the exercise of the franchise and because this impact is related to the resources of voters supporting a particular candidate . . . ."[217] The Court stated that it had

> not heretofore attached such fundamental status to candidacy as to invoke a rigorous standard of review. However, the rights of voters and the rights of candidates do not lend themselves to neat separation . . . .[218]

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[213]Thorpe v. Housing Authority, 393 U.S. 268, 284 (1969) (Black, J., concurring).

[214]405 U.S. 134 (1972).

[215]*Id.* at 143. In counties with populations of one million or more, candidates for two-year terms could be assessed up to ten percent of their aggregate annual salary, and candidates for four-year terms could be assessed up to fifteen percent. In smaller counties, there were no percentage limitations. A $6,300 filing fee—thirty-two percent of the annual salary of $19,700—was set for county judge in Tarrant County—an office sought by one appellee in *Bullock*. Filing fees in excess of $5,000 were typical for certain offices in some counties. Amounts not needed to finance the primary were refunded and, in some counties, refunds tended to run as high as fifty percent or more of the assessed filing fee. *Id.* at 138.

[216]*Id.* at 143 (emphasis added).

[217]*Id.* at 144.

[218]*Id.* at 142-43.

The opinion noted that a barrier to candidacy "does not of itself compel close scrutiny."[219]

The impact of the filing fees on voters was considered "real and appreciable" because voters were "substantially limited in their choice of candidates"[220] and was not unlike the exclusionary impact of the poll tax in *Harper v. Virginia Board of Elections.*[221] The *Bullock* Court measured impact on the exercise of the franchise in terms of *candidacy* as well as on voting. The Court was thus concerned that "[m]any potential office seekers . . . [are] precluded from seeking the nomination of their chosen party, no matter how qualified they might be, and no matter how broad or enthusiastic their popular support."[222] It also observed that the Texas system fell "with unequal weight on voters, *as well as candidates,* according to their economic status."[223] Thus, despite the fact that the Texas filing fee system had a limited rational basis,[224] the Court found that Texas had failed to make the "showing of necessity" necessary under the strict scrutiny standard.[225]

In *Lubin v. Panish,*[226] a filing fee of $701.60 for a place on the Board of Supervisors of Los Angeles County was invalidated when challenged by an indigent citizen who had sought nomination but was unable to pay the fee. The Court took notice of the "shift in emphasis" from "restricting the ballot to achieve voting rationality," a concern of progressive thought in the first half of the century, to the present "enlarged demand for an expansion of political opportunity."[227] Corresponding to the demand for increased political opportunity "has been a gradual enlargement of the Fourteenth Amendment's equal protection provision in the area of voting rights."[228] The Court recognized the state's legitimate interest in discouraging "fragmentation of voter choice" and eliminating frivolous candidates[229] but held that this interest must be achieved "by a means that does not unfairly or unnecessarily burden either a minority party's *or an individual candidate's* equally important interest in the continued availability of political opportunity."[230] The Court considered the impact of the filing

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[219] *Id.* at 143.

[220] *Id.* at 144.

[221] 383 U.S. 663 (1966).

[222] 405 U.S. at 143.

[223] *Id.* at 144.

[224] *Id.* at 147. Filing fees relieve the state treasury of the cost of conducting primary elections—a "legitimate state objective."

[225] *Id.*

[226] 415 U.S. 709 (1974).

[227] *Id.* at 713.

[228] *Id.*

[229] *Id.* at 715.

[230] *Id.* at 716 (emphasis added).

fees upon voters and noted once again that the "right of a party or an individual to a place on a ballot is entitled to protection and is intertwined with the rights of voters."[231] Filing fees cannot be used as the "sole means of determining a candidate's 'seriousness' "[232] since even a moderate fee might prevent impecunious but serious candidates from seeking election.[233] Although the Court did not discuss the standard of review it applied in *Lubin*, the California filing fee was found "not reasonably necessary," in the absence of an alternative access to the ballot for indigents.[234]

More broadly construed, the filing fee cases suggest that conclusive presumptions relating to candidate status which penalize fundamental rights or classify on the basis of constitutionally suspect traits deserve close scrutiny. This is especially true of factors over which a candidate has no present control. The indigent office seekers in *Bullock* and *Lubin* were " '*unable*, not simply *unwilling*, to pay assessed fees.' "[235]

Acceptance of the *Bullock* Court's conclusion that not every barrier to candidacy requires strict scrutiny is not inconsistent with the view that close scrutiny of restrictions on political candidacy may often be appropriate. The Supreme Court recently observed that "[s]tatutes creating permanent irrebuttable presumptions have long been disfavored under the Due Process Clause . . . ."[236] Thus, the Court had invalidated a federal statute that created a conclusive presumption that gifts made within two years prior to the donor's death were made in contemplation of death and thus required the payment of a higher tax.[237] For similar reasons, the Court struck down Illinois' irrebuttable statutory presumption that all unmarried fathers are unqualified to raise their children.[238] It is apparently unnecessary that the conclusive presumption be "permanent" because the Court invalidated a nonpermanent conclusive presumption of fault in Georgia's law authorizing the *suspension* without a hearing of the driving license of an uninsured motorist involved in an accident who could not post security for the amount of damages claimed.[239] Conclu-

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[231] *Id.*

[232] *Id.*

[233] *Id.* at 717.

[234] *Id.* at 718.

[235] *Id.* at 717, *quoting from* Bullock v. Carter, 405 U.S. 134, 146 (1972) (emphasis in original).

[236] Vlandis v. Kline, 412 U.S. 441, 446 (1973).

[237] Heiner v. Donnan, 285 U.S. 312 (1932).

[238] Stanley v. Illinois, 405 U.S. 645 (1972).

[239] Bell v. Burson, 402 U.S. 535 (1971). Georgia's presumption was not "permanent" since the suspension was only temporary, the motorist being entitled to the return of his license upon proof of lack of fault at the trial.

sive presumptions barring candidacy for public office generally appear neither reasonable nor necessary as a sole means of determining a candidate's "seriousness" or "ability to serve."

VI. Abstention

When claims of federally secured political rights are premised upon unsettled questions of state law, abstention may be appropriate. In *Harris County Commissioners Court v. Moore*,[240] a precinct consolidation, intended to reduce population disparities among precincts, resulted in the displacement of three Texas justices of the peace and two constables. Acting pursuant to Texas statute,[241] the Harris County governing body had declared these offices vacant since there were more officials living in the precinct than the number of offices available under state law.[242] The displaced justices and constables brought suit in federal district court and a three-judge court was convened, which enjoined implementation of the redistricting plan on the ground that the Texas statute providing for the removal of the plaintiffs was unconstitutional on its face. The district court reasoned that a statute which shortens the term of an elected official merely because redistricting places him in a district with others "invidiously and irrationally discriminates between him and others not so affected."[243] In addition, it held that the statute as applied had discriminated between those who voted or were entitled to vote for the displaced officials and voters in other precincts whose elected officials were permitted to serve a full term. The Supreme Court reversed and remanded to the district court with directions to abstain. Abstention was considered appropriate under the doctrine of *Railroad Commission v. Pullman Co.*[244] because the Texas statute under which the justices and constables were removed from office was in apparent conflict with article 5, section 24 of the Texas Constitution which provides a mechanism for removal of county officers, including justices and constables.[245] The case

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[240]95 S. Ct. 870 (1975).

[241]Tex. Rev. Civ. Stat. art. 2351½(c) (1971).

[242]After redistricting, four justices and three constables found themselves residents of a single precinct, which was entitled by law to a mixiumum of only one constable and two justices of the peace. 95 S. Ct. at 873.

[243]*Id.* at 874.

[244]312 U.S. 496 (1941). *See also* Lake Carriers Ass'n v. MacMullan, 406 U.S. 498 (1972); Reetz v. Bozanich, 397 U.S. 82 (1970). Under the *Pullman* doctrine, federal abstention is proper when a federal claim is premised on an unsettled question of state law and a state court settlement of the underlying question of state law might obviate the need for reaching the federal constitutional question.

[245]95 S. Ct. at 876. It also appeared "far from settled that under state law the appellee officeholders must lose their jobs." *Id.* at 877.

for abstention allegedly was further strengthened because "the availability of the relief sought turn[s] in large part on the same unsettled state law questions."[246] Justice Douglas dissented on the ground that the Supreme Court should "leave to our district judges the question whether the local law problem counseled abstention."[247]

The application of abstention in *Harris County* is consistent with the long-standing policy of avoiding unnecessary decisions on constitutional questions.[248] Abstention, however, exacts a heavy toll. As a practical matter, it often forecloses access to a federal court of original jurisdiction. While it is technically possible for the federal plaintiff to reserve his federal claims for trial in the federal district court,[249] factors of cost and time heavily militate in favor of waiver of the right to return to a federal court.[250] Yet, the availability of a federal forum for the vindication of federal claims may be equal in importance to the declaratory role of the Supreme Court in the exposition of federal rights.[251] Conceivably, the disruptive effect of the abstention doctrine upon state policies of justiciability[252] may, in some instances, outweigh the value of federal deference of the state law question to the state courts. Thus, the Supreme Court in *Harris County* was forced into the unusual posture of directing that the district court *dismiss* the complaint in order "to remove any possible obstacles to state court jurisdiction."[253] The unusual course adopted in *Harris County* goes to form rather than substance since the dismissal was without prejudice to the right of the federal plaintiffs to make reservation in the state courts, similar to that outlined in *England v. State Board of Medical Examiners*.[254] Whether the Texas Supreme Court, faced with reservation following federal "dismissal," would

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[246]*Id.* at 877.

[247]*Id.* at 879 (Douglas, J., dissenting).

[248]*See, e.g.*, Ashwander v. TVA, 297 U.S. 288, 346 (Brandeis, J., concurring).

[249]*See* England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 421-22 (1964). The state courts must be fully apprised of the nature of the federal challenge to the state statute. Government & Civic Employees Organizing Comm. v. Windsor, 353 U.S. 364, 366 (1957).

[250]*See* NAACP v. Button, 371 U.S. 415, 427 (1963).

[251]*See, e.g.*, Mishkin, *The Federal "Question" in the District Courts*, 53 COLUM. L. REV. 157, 170-71 (1953).

[252]*See, e.g.*, United Services Life Ins. Co. v. Delaney, 396 S.W.2d 855 (Tex. 1965). *Cf.* Romero v. Coldwell, 455 F.2d 1163, 1167 (5th Cir. 1972); Barrett v. Atlantic Richfield Co., 444 F.2d 38, 45-46 (5th Cir. 1971).

[253]95 S. Ct. at 878. Ordinarily the "proper course in ordering *Pullman* abstention is to remand with instructions to retain jurisdiction but to stay the federal suit pending determination of the state law questions in the state court." *Id.* at 878 n.14.

[254]375 U.S. 411 (1964).

decide the federal question remains to be seen. The precedence of the right to make an *England* reservation over state doctrines of justiciability is clear under the supremacy clause.[255] The upshot is that abstention in *Harris County* could promote more friction between federal and state courts than it would avoid.

State courts are the final expositors of state law under our federal system and the reluctance of federal courts to render decisions which could be undermined by later state court decisions is understandable. However, reluctance to reach difficult state law questions should be tempered by the fact that federal district judges are generally "versed in the idiosyncrasies of . . . [state] law."[256] In diversity cases, federal judges decide difficult questions of state law regularly, although the federal diversity decisions are equally subject to the possibility that a state forum will subsequently decide that the federal court's interpretation of state law was erroneous. Justice Douglas' recommendation, that in matters of abstention the Supreme Court defer to federal district judges "who are from the state whose local law is at issue,"[257] would probably result in an unfortunate increase in the incidence of abstention since federal district judges in many areas may be even more loath than the Supreme Court to reach federal constitutional questions.

It is important to keep the abstention doctrine within reasonable bounds. There is a danger that *Harris County* will prompt a rash of misconceived abstention orders at the district court level which either will not be challenged because of the time consuming and expensive appeal process[258] or will be mooted prior to decision.[259] As Justice Douglas observed, the plaintiffs in *Harris*

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[255]*Compare* Henry v. Mississippi, 379 U.S. 443 (1965).

[256]95 S. Ct. at 878 (Douglas, J., dissenting).

[257]*Id.* at 879 (Douglas, J., dissenting).

[258]An abstention order of a three-judge court is probably no longer appealable directly to the Supreme Court under 28 U.S.C. § 1253 (1970). *See* Daniel v. Waters, Civil No. 74-2230 (6th Cir., Apr. 10, 1975). *Cf.* Gonzales v. Automatic Employees Credit Union, 419 U.S. 90, 100 (1974), *noted in* 8 IND. L. REV. 595 (1975). *But cf.* Zwickler v. Koota, 389 U.S. 241 (1967); Doud v. Hodge, 350 U.S. 485 (1956). It is unclear whether an abstention order is final within the meaning of 28 U.S.C. § 1291, or whether it would amount to a denial of requested injunctive relief under 28 U.S.C. § 1291(a). *Cf.* Gonzales v. Automatic Employees Credit Union, *supra*, at 293 n.11. The only method of review may be under 28 U.S.C. § 1292(b) in the court of appeals and by certiorari, either before or after judgment, under 28 U.S.C. § 1254.

[259]The threat of mootness in political cases presents especially troublesome problems. Abstention exacerbates the mootness problem, although the issues may sometimes be reviewed subsequently under the "capable-of-repetition-yet-evading-review" exception to mootness. *See, e.g.*, Dunn v. Blumstein, 405 U.S. 330 (1972).

County "would necessarily have to be very rich officeholders—or else be financed by some foundation—to be able to pay the expense of this long, drawn-out litigation."[260] The heavy toll exacted by abstention in terms of time, expense, and frustration of federal rights may often outweigh its value in promoting a harmonious federalism. But the value of abstention in avoiding premature federal questions cannot be gainsaid.

The primary purpose of the federal courts should be the vindication of federal rights. The difficulty with abstention is that it may effectively foreclose access to a federal court of original jurisdiction. Although the avoidance of unnecessary constitutional decisions embodies an important policy of judicial restraint, the value of abstention in particular cases should be carefully balanced against the need to provide a federal forum of original jurisdiction for the vindication of federal rights. Absent an expedited process for certification of unsettled state law questions to the state court of last resort,[261] the doctrine often exacts too heavy a toll in the timely vindication of federal rights.[262] Abstention can perhaps be justified in *Harris County* because the unresolved state constitutional question was different in character from plaintiffs' federal equal protection claim. When the unresolved state constitutional claim and the asserted federal claim are based on similar provisions in the state and federal constitution, abstention would be highly inappropriate. Closing the door to federal courts solely to provide an "opportunity for the state courts to dispose of the problem either under the . . . [state] Constitution or the U.S. Constitution," as Chief Justice Burger suggested several years ago,[263] would negate federal jurisdiction over federal constitutional claims against state officers and would violate the Congressional purposes in bestowing federal question jurisdiction upon the federal courts.[264]

VII. Political Party Governance and the Nomination Process

Courts traditionally have regarded political parties as private voluntary organizations which, absent exceptional circum-

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[260]95 S. Ct. at 878 (Douglas, J., dissenting).

[261]*See, e.g.*, Fla. Stat. Ann. § 25.031 (1961). *See also* Lillich & Mundy, *Federal Court Certification of Doubtful State Law Questions*, 18 U.C.L.A. L. Rev. 888 (1971).

[262]*See, e.g.*, Home Tel. & Tel. Co. v. City of Los Angeles, 227 U.S. 278 (1913). *Cf.* Wisconsin v. Constantineau, 400 U.S. 433 (1971).

[263]Wisconsin v. Constantineau, 400 U.S. 433, 440 (1971) (Burger, C.J., dissenting).

[264]*See* 42 U.S.C. § 1983 (1970) and its jurisdictional counterparts, 28 U.S.C. §§ 1331, 1343. *See also* Zwickler v. Koota, 389 U.S. 241, 248 (1967);

stances,[265] are free to operate under their own rules without judicial interference or supervision.[266] During the past decade, reform efforts to "democratize" American political parties[267] have spawned claims that party governance constitutes state action and that political parties are accountable under the due process and equal protection clauses of the fourteenth amendment.[268] The Supreme Court has not yet had occasion for plenary review of "these novel and important questions."[269] But, in *Cousins v. Wigoda*,[270] the Court held that the rules of a national political party must be accorded primacy over state law in the determination of the qualifications and eligibility of delegates to the party's national convention.

The Cousins delegates successfully argued before the National Democratic Party Credentials Committee that the seating of the Wigoda delegates elected in the 1972 Illinois primary was violative of party guidelines.[271] Two days before the convention

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Harman v. Forssenius, 380 U.S. 528 (1965); Baggett v. Bullitt, 377 U.S. 360 (1964).

[265]The "White Primary" cases, *supra* note 84, are the major exception. Another exception is Gray v. Sanders, 372 U.S. 368 (1963), in which the Court invalidated the Georgia county unit system of counting votes in primary elections under the one-person/one-vote principle.

[266]*See, e.g.*, Irish v. Democratic-Farmer-Labor Party, 399 F.2d 119 (8th Cir. 1968); Lynch v. Torquato, 343 F.2d 370 (3d Cir. 1965); Smith v. State Executive Comm. of Democratic Party, 288 F. Supp. 371 (N.D. Ga. 1968).

[267]*See, e.g.*, 1968 DEMOCRATIC PROCEEDINGS #269. This mandate called for all Democratic voters to have "a full and timely opportunity to participate" in 1972, urged the abandonment of the unit rule, and declared that delegates should be selected within the calendar year of the 1972 national convention. *See also* COMM'N ON PARTY STRUCTURE AND DELEGATE SELECTION, MANDATE FOR REFORM (1970); OFFICIAL CALL FOR THE 1972 DEMOCRATIC NATIONAL CONVENTION (1971). The McGovern Commission's MANDATE FOR REFORM (1970) established the controversial guidelines under which the Illinois and California delegations to the 1972 Convention were challenged. *See* Cousins v. Wigoda, 95 S. Ct. 541 (1975); Brown v. O'Brien, 409 U.S. 1 (1972) (per curiam). For comments on the development of the 1972 guidelines, *see* Schmidt & Whalen, *Credentials Contests and the 1968—and 1972—Democratic National Conventions*, 82 HARV. L. REV. 1438 (1969); Segal, *Delegate Selection Standards: The Democratic Party's Experience*, 38 GEO. WASH. L. REV. 873 (1970).

[268]*See, e.g.*, O'Brien v. Brown, 409 U.S. 1 (1972); Bode v. National Democratic Party, 452 F.2d 1302 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 1019 (1972); Georgia v. National Democratic Party, 447 F.2d 1271 (D.C. Cir. 1971); Irish v. Democratic-Farmer-Labor Party, 399 F.2d 119 (8th Cir. 1968); Lynch v. Torquato, 343 F.2d 370 (3d Cir. 1965); Smith v. State Executive Comm. of Democratic Party, 288 F. Supp. 371 (N.D. Ga. 1968).

[269]O'Brien v. Brown, 409 U.S. 1, 3 (1972).

[270]95 S. Ct. 541 (1975).

[271]The Credentials Committee sustained the findings and report of a hearing officer that the Wigoda delegates had been chosen in violation

the Wigoda delegates obtained an injunction from the Illinois Circuit Court enjoining the Cousins group from acting as delegates at the convention. The Cousins delegates took their seats and participated fully as delegates throughout the convention.[272] The Illinois Appellate Court affirmed the circuit court's injunction and held that the "right to sit as a delegate representing Illinois at the national nominating convention is governed exclusively by the Illinois Election Code," and that the "interest of the State in protecting the effective right to participate in primaries is superior to whatever other interests the party itself might wish to protect."[273] In consequence, proceedings to adjudge the Cousins delegates in criminal contempt were brought in the Illinois Circuit Court pending review by the United States Supreme Court of the validity of the injunction. Only the presence of collateral legal consequences—in this case, criminal contempt—avoided dismissal of the petition for certiorari on the ground of mootness.[274]

In June and July of 1972 the District Court for the District of Columbia and the Court of Appeals for the District of Columbia twice considered an action brought by one of the Wigoda delegates challenging the constitutionality of the party guidelines.[275] The Cousins delegates intervened, and the party counterclaimed for an injunction enjoining the Wigoda delegates from proceeding with the state court action. The case, although initially dismissed because the Credentials Committee had not yet decided the Cousins challenge, proceeded after the Credentials Committee had adopted the hearing officer's findings and report.[276] The court of appeals

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of Guidelines A-1 (minority group participation), A-2 (women and youth participation), A-5 (existence of party rules), C-1 (adequate public notice of party affairs), C-4 (timing of delegate selection), and C-6 (slate-making). *Id.* at 543 n.1.

[272]Generally an injunction must be obeyed, even if there is a question of its validity, until it is challenged and overturned in court. *See, e.g.*, Walker v. City of Birmingham, 388 U.S. 307 (1967). Disobedience of the Illinois injunction in *Cousins* was excusable because the acts of the Cousins delegates fell within the exception to the *Walker* rule: "This case would arise in quite a different constitutional posture if the petitioners, before disobeying the injunction, had challenged it in the Alabama courts, and had been met with delay or frustration of their constitutional claims." *Id.* at 318.

[273]Wigoda v. Cousins, 14 Ill. App. 3d 460, 472-77, 302 N.E.2d 614, 626-29 (1973), *appeal denied without opinion*, Ill. Sup. Ct., Nov. 29, 1973.

[274]*See, e.g.*, Keane v. National Democratic Party, 469 F.2d 563 (D.C. Cir. 1972), *stay granted sub nom.*, O'Brien v. Brown, 409 U.S. 1, *cert. granted and judgment vacated and remanded for a determination of mootness*, 409 U.S. 816, *dismissed as moot*, 475 F.2d 1287 (1973).

[275]*Id.*

[276]95 S. Ct. at 546.

affirmed the dismissal of the complaint but granted the counterclaim and directed the entry of an order enjoining the Wigoda delegates from proceeding with the Illinois suit.[277] The Supreme Court at a Special Term on July 7 stayed the judgment of the court of appeals[278] and, on October 10, granted certiorari, vacated the judgment, and remanded for a determination of mootness.[279]

The Cousins delegates contended that the Illinois Circuit Court was without jurisdiction to enter its July 8 injunction, notwithstanding the Supreme Court's July 7 stay of the court of appeals' judgment. Their argument was based on the Court's reference, in its per curiam opinion supporting the stay, to "the large public interest in allowing the political processes to function free from judicial supervision."[280] The Supreme Court, however, found the argument to be without merit and agreed with the Illinois Appellate Court that the stay order "completely froze the order of the Court of Appeals, including the injunction order directed to the Circuit Court of Illinois, thereby allowing the Circuit Court to proceed."[281]

In considering whether the "State's legitimate interest in the protection of votes cast at the primary"[282] justified the injunction, the Court observed that, though legitimate, the " 'subordinating interest of the state must be compelling' to justify the injunction's abridgment of the exercise by petitioners and the National Democratic Party of their constitutionally protected rights of association."[283] Having found the compelling interest standard applicable, the Court concluded that "Illinois' interest in protecting the integrity of its electoral process cannot be deemed compelling in the context of the selection of delegates to the National Party Convention."[284] Thus, the Court reiterated the belief that " 'the

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[277]Keane v. National Democratic Party, 469 F.2d 563, 573-75 (D.C. Cir. 1972).

[278]O'Brien v. Brown, 409 U.S. 1 (1973) (per curiam).

[279]Keane v. National Democratic Party, 409 U.S. 816 (1972).

[280]O'Brien v. Brown, 409 U.S. 1, 5 (1972).

[281]Cousins v. Wigoda, 95 S. Ct. 541, 547 (1975), *quoting from* Wigoda v. Cousins, 14 Ill. App. 3d 460, 302 N.E.2d 614 (1973). The Cousins delegates also argued that the District of Columbia Circuit Court of Appeals' injunction "did not alter the binding collateral estoppel and *res judicata* effect of that [court of appeals] judgment so as to permit collateral attack in the Illinois state courts." *Id.* The failure to plead and prove the collateral estoppel defense in the Illinois Circuit Court as required by Illinois law was an adequate state ground foreclosing Supreme Court review. *See, e.g.*, Louisville & N.R.R. v. Woodford, 234 U.S. 46 (1914).

[282]95 S. Ct. at 548.

[283]*Id, quoting from* NAACP v. Alabama, 357 U.S. 449, 463 (1958).

[284]95 S. Ct. at 549.

convention itself [was] the proper forum for determining intraparty disputes as to which delegates [should] be seated.' "[285]

Cousins was premised in part on the "constitutionally protected right of association" of the National Democratic Party and its adherents.[286] The decisive rationale of the holding was the "pervasive national interest in the selection of candidates for national office."[287] This national interest was deemed "greater than any interest of an individual state."[288] The Court recognized that if each of the fifty states could establish the qualifications of its delegates to the various party conventions without regard to party policy, the result "could seriously undercut or indeed destroy the effectiveness of the National Party Convention, . . . a process which usually involves coalitions cutting across state lines."[289] The Court referred to the admonition of Mr. Justice Pitney in *Newberry v. United States*[290] as to the paramount necessity for effective performance of the Convention's task: "As a practical matter, the ultimate choice of the mass of voters is predetermined when the nominations have been made."[291]

In concluding that the convention was the proper forum to determine intraparty disputes like the Cousins-Wigoda controversy, the Court was careful to note that *Cousins* was not a case "presenting claims that the Party's delegate selection procedures are not exercised within the confines of the constitution."[292] Does this reasonably imply that the courts—not the convention—may be the appropriate forum for testing whether party delegate selection procedures are constitutional? The Court's quotation of Justice Pitney in *Newberry* certainly provides some support for a later holding that delegate selection constitutes governmental action because it is an "integral part" of the election process.[293] The concurring justices[294] in *Cousins* would have rested the result "unequivocably on the freedom to assemble and associate . . . and [would not have discussed or hinted] at resolution of issues neither presented here nor previously resolved . . . ."[295] They criticized the Court for "unnecessarily broad language" and for turning

[285] *Id.*, *quoting from* O'Brien v. Brown, 409 U.S. 1, 4 (1972).

[286] 95 S. Ct. at 547.

[287] *Id.* at 549.

[288] *Id.*

[289] *Id.*

[290] 256 U.S. 232 (1921).

[291] *Id.* at 286 (Pitney, J., concurring in part and dissenting in part).

[292] 95 S. Ct. at 549.

[293] *Id.* at 548-49.

[294] *Id.* at 549 (Burger, C.J., Stewart & Rehnquist, JJ., concurring).

[295] *Id.* at 552. The reference was to note 4 in the opinion in which the Court listed three questions "not before us in this case, and [upon which the Court] . . . intimat[ed] no views upon the merits." *Id.* at 545-46.

"virtually on its head" the Court's opinion in *O'Brien*.[296] The concurring justices also criticized the Court for denigrating the residual authority of the states in the selection of presidential and vice-presidential candidates.[297]

Justice Powell agreed that the national convention could seat whomever it pleased as delegates at large but dissented on the ground that Illinois has "a legitimate interest in protecting its citizens from being *represented* by delegates who have been rejected by these citizens in a democratic election."[298]

Cousins has federalized the law of delegate selection to national conventions on the basis of the "pervasive national interest" in the selection of presidential and vice-presidential candidates. Under the majority view, rules of national political parties are entitled to presumptive validity when they conflict with state laws. The decision should be welcomed by those who favor the growth of strong, national political parties. The substantial interest in the primacy of national rather than state authority in the governance of national political parties can be justified for many of the same reasons supporting the primacy of national interests under the commerce clause.[299]

Justice Pitney's opinion in *Newberry v. United States*[300] deserves careful consideration because of its apparent consistency with the views of the present majority.[301] The Federal Corrupt Practices Act,[302] which regulated candidate expenses in primary elections for senator and representative, was invalidated in *Newberry* as beyond the power of Congress under article I, section 4 of the Constitution.[303] Justice Pitney, concurring on other grounds,

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[296]*Id.* at 550.

[297]*Id.* at 552.

[298]*Id.* (Powell, J., concurring in part and dissenting in part) (emphasis in original).

[299]*See, e.g.*, Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964); Wickard v. Filburn, 317 U.S. 111 (1942); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).

[300]256 U.S. 232, 275 (1921) (Pitney, J., concurring in part and dissenting in part).

[301]Two separate references were made to Justice Pitney's opinion in the majority opinion in *Cousins* and one in the concurring opinion. *See* Cousins v. Wigoda, 95 S. Ct. 541, 546 n.4, 549 (1975). *Compare id.* at 551 (Rehnquist, J., concurring).

[302]Act of June 25, 1910, ch. 392, 36 Stat. 822, *as amended*, Act of Aug. 8, 1911, ch. 33, 37 Stat. 25.

[303]U.S. CONST. art. 1, § 4 provides:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make

strongly affirmed the power of Congress under article I, section 4 with a broad construction of the section[304] and an argument that the "authority of Congress to regulate the primary elections and nominating conventions arises, of necessity, not from any indefinite or implied grant of power, but from one clearly expressed in the Constitution itself . . . ."[305] The difficulty with using Justice Pitney's opinion in *Newberry* to support the Court's "pervasive national interest" argument in *Cousins* was suggested by Justice Rehnquist: "*Newberry*, . . . without more, does not establish . . . a 'national interest' which *standing alone, apart from valid congressional legislation or constitutional provision* would override state regulation in this situation."[306] The absence of valid congressional legislation or constitutional provision, however, does not preclude the applicability of federal common law.[307] The "pervasive national interest" argument is not "unnecessarily broad and vague" if it premises a holding based on federal common law.[308]

The desirability for the primacy of national party rules pertaining to delegate selection to national political conventions is as apparent as the need for uniform federal rules governing the commercial paper of the United States.[309] In *Clearfield Trust v. United States*[310] the primacy of state law would have led to ex-

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or alter such Regulations, except as to the Places of Choosing Senators.

The present Court has adopted a much more expanded view of the scope of federal authority over national elections than when *Newberry* was decided. *See, e.g.*, Oregon v. Mitchell, 400 U.S. 112 (1970), in which Justice Black declared: "Acting under its broad authority to create and maintain a national government, Congress unquestionably has power to regulate federal elections." *Id.* at 134.

[304]256 U.S. at 279-80.

[305]*Id.* at 286. The clearly expressed grant of power referred to by Justice Pitney was the necessary and proper clause of article I, section 8 of the Constitution.

[306]95 S. Ct. at 551 (Rehnquist, J., concurring) (emphasis added).

[307]Federal common law refers generally to "federal rules of decision where the authority for a federal rule is not explicitly or clearly found in statutory or constitutional command." H.M. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 770 (rev. ed. 1973). On the general problems of federal common law and the relevant scholarly literature, see *id.* at 756-832.

[308]*Id.* at 756-832.

[309]*See* Clearfield Trust Co. v. United States, 318 U.S. 363 (1943).

[310]318 U.S. 363 (1943). *Compare* Illinois v. City of Milwaukee, 406 U.S. 91 (1972) (federal common law of air or water in their ambient or interstate aspects); Bivens v. Six Unknown Named Agents, 402 U.S. 388 (1971) (federal right to damages implied from violation of fourth amendment); Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275 (1959) (federal common law governs construction of interstate compact); Textile Workers

ceptional uncertainty and diverse results in commercial transactions in situations in which the "desirability of a uniform rule is plain."[311] In *Cousins*, as in *Clearfield Trust*, the "choice of a federal rule designed to protect a federal right . . . stands as a convenient source of reference for fashioning federal rules applicable to these federal questions."[312] While there is no justification for the application of federal law to litigation purely between private parties concerning transactions "essentially of local concern,"[313] it is apparent, as the majority reasoned in *Cousins*, that the selection of presidential and vice-presidential candidates by national political parties is a transaction essentially of national concern.

Congress has acted through valid legislation to protect the strong federal interest in presidential elections.[314] The Court could infer from the various federal voting rights acts a federal policy of protecting presidential elections and requiring that they be conducted in a democratic manner. In *Cousins* the Court made federal law interstitially, that is, it filled in one of the important gaps created by the absence of comprehensive federal legislation regulating the conducting of presidential nominations and elections. As Justice Jackson once stated:

> The federal courts have no *general* common law . . . . But this is not to say that wherever we have occasion to decide a federal question which cannot be answered from federal statutes alone we may not resort to all the source materials of the common law, or that when we have fashioned an answer it does not become a part of the federal non-statutory or common law.[315]

The source of the federal law is found in the Federal Constitution, statutes, or common law and is implemented and conditioned by them.[316]

The difficulty with interpreting *Cousins* as interstitial federal common law emanating from federal voting rights statutes is that the federal statutes have been addressed to presidential elections and not the convention-nominating process. In this re-

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Union v. Lincoln Mills, 353 U.S. 448 (1957) (federal common law of labor contracts must be fashioned from the policies of national labor laws).

[311] 318 U.S. at 367.

[312] *Id.*

[313] Bank of America Nat'l Trust & Sav. Ass'n v. Parnell, 352 U.S. 29, 35 (1956).

[314] *See* Voting Rights Act of 1965, 42 U.S.C. §§ 1973 *et seq.* (1970). *See also* Oregon v. Mitchell, 400 U.S. 112 (1970); South Carolina v. Katzenbach, 383 U.S. 301 (1966).

[315] D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447, 469 (1942) (Jackson, J., concurring).

[316] *Id.* at 472.

spect, Justice Pitney's opinion in *Newberry* may provide the missing link.[317] However, even if the primacy of the rules of national political parties cannot be inferred interstitially from federal voting rights legislation regulating presidential elections, the primacy of national party rules may be inferred from the fact that national elections are primarily a matter of national concern and that the "States themselves have no constitutionally mandated role in the great task of the selection of presidential and vice-presidential candidates."[318]

The sensitive and highly important questions concerning the reach of the due process clause in intraparty disputes make the applicability of federal common law by the courts particularly appropriate. The Court is uniquely well-suited to define a limited federal common law applicable to the nomination of presidential candidates. Moreover, the Court is in a much better position than Congress to balance the concept of fairness implicit in the due process clauses of the fifth and fourteenth amendments against equally sensitive first amendment rights of speech and association. As the guarantor of first amendment rights under our system, the Court would not face the formidable inhibitions to congressional regulation under the first amendment.[319] Policies of judicial restraint developed to accommodate interests of state governments[320] or coordinate federal branches[321] would be correspondingly appropriate in fashioning a common law appropriate to party governance as it relates to the nomination process.

Respect for delicate first amendment rights of association and free speech demand that rules of private political associations be accorded the presumptive validity courts give acts of Congress[322] or state legislatures.[323] Courts have wisely refrained from straight-jacketing political parties with one-person/one-vote[324] or

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[317] *See* text accompanying note 291 *supra*.

[318] 95 S. Ct. at 549. *But see id.* at 551-52 (Rehnquist, J., concurring).

[319] *See, e.g.*, American Communications Ass'n v. Douds, 339 U.S. 382, 407 (1950).

[320] *See, e.g.*, Younger v. Harris, 401 U.S. 37 (1971).

[321] *See, e.g.*, United Public Workers v. Mitchell, 330 U.S. 75 (1947).

[322] *See, e.g.*, Fleming v. Nestor, 363 U.S. 603 (1960).

[323] *See, e.g.*, Dandridge v. Williams, 397 U.S. 471 (1970).

[324] *See, e.g.*, Georgia v. National Democratic Party, 447 F.2d 1271 (D.C. Cir. 1971); Irish v. Democratic-Farmer-Labor Party, 399 F.2d 119 (8th Cir. 1968). In Gray v. Sanders, 372 U.S. 368, 378 n.10 (1973), the Court expressly declined to reach the question of whether its decision applied to nomination by convention. But the Court has been reluctant to extend the one-person/one-vote requirement beyond popular elections. *See, e.g.*, Sailors v. Board of Educ., 387 U.S. 105, 109-10 (1967). *Cf.* Fortson v. Morris, 385 U.S. 231 (1966).

one-party-member/one-vote formulae.[325] The fact that it is impossible to decide rationally whether it would be fairer to distribute delegates according to population or party membership is evidence that the difference is not one of constitutional dimensions.

National political parties serve a quasi-governmental function. Political parties are not deprived of their quasi-public character simply because they are private associations.[326] The predominant character and purpose of political parties, like that of a park in *Evans v. Newton*,[327] is public. The broad reach of state action under the fourteenth amendment[328] should be sufficient to reach political parties, although it would appear that national political parties would more appropriately fall within the purview of the due process clause of the fifth rather than the fourteenth amendment.[329]

Despite the federal common law approach of the Court in *Cousins*, significant obstacles frustrate the creation of federal common law applicable to political party governance and the nomination process. Lack of ripeness[330] will preclude federal review in political cases until there is adequate time to permit the reflection necessary for deliberate judicial decision-making, and mootness will require dismissal.[331] Furthermore, two aspects of the political question doctrine[332] often will counsel against judicial intervention: the lack of judicially discoverable and manageable standards, and the impossibility of deciding a question without an initial nonjudicial, discretionary policy determination. Lack of justiciability, therefore, will preclude federal determination of many claims and will shield federal courts from becoming embroiled in intraparty squabbles. Most intraparty disputes are best left to the decision of the people on election day. An appropriate time frame for judicial resolution of a problem is essential since court

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[325]Bode v. National Democratic Party, 452 F.2d 1302 (D.C. Cir. 1971); Lynch v. Torquato, 343 F.2d 370 (3d Cir. 1965).

[326]*Compare* Amalgamated Food Employees Union v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968); Marsh v. Alabama, 326 U.S. 501 (1946); Civil Rights Cases, 109 U.S. 3, 41 (1883) (Harlan, J., dissenting). *But cf.* Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972).

[327]382 U.S. 296 (1966).

[328]*See, e.g.*, Reitman v. Mulkey, 387 U.S. 369 (1967); Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961); Shelley v Kraemer, 334 U.S. 1 (1948).

[329]*See, e.g.*, Bolling v. Sharpe, 347 U.S. 497 (1964); Schneider v. Rusk, 377 U.S. 163 (1964).

[330]*See, e.g.*, Poe v. Ullman, 367 U.S. 497 (1961) (challenge to unenforced birth control statute held nonjusticiable).

[331]This was the situation in Keane v. National Democratic Party, 469 F.2d 563 (D.C. Cir. 1972). *See* text accompanying notes 275-79 *supra*.

[332]*See* Baker v. Carr, 369 U.S. 186, 217 (1962).

involvement in convention-eve delegate disputes would appear unwise, absent abuses of the most flagrant kind.

The Court's decision in *O'Brien v. Brown*[333] recognized the strong tradition of judicial noninterference in the affairs of private political parties. The striking differences of language and concept between *O'Brien* and *Cousins* suggest the need for closer examination. Does *Cousins*, as Justice Rehnquist has charged, "turn virtually on its head the Court's opinion in *O'Brien*"?[334] Careful scrutiny of the two opinions suggests otherwise. Two members of the Court, Justices Douglas and Marshall, dissented in *O'Brien*. Justice White voted to deny the application for a stay but did not write an opinion. Justice Brennan, the author of the majority opinion in *Cousins*, concurred in *O'Brien* because of the "limited time available . . . [to] give these difficult and important questions consideration adequate for their proper resolution."[335] Apparently, Justice Blackmun must have had reservations in *O'Brien* similar to those of Justice Brennan, since Justice Blackmun was one of the five-member majority in *Cousins*. What emerges is a sharply divided Court in which the time frame for judicial deliberation is sufficient to shift two members, Justices Brennan and Blackmun.

Is the justiciability of claims to be seated at future national political conventions implicit in *Cousins*?[336] If the rules of national political parties are to be given precedence over the laws of the states, it is apparent that party rules must satisfy the basic fairness requirements of due process. There is no way to assure the fairness of party rules other than by providing access to the courts. There is no reason why the fairness of party rules relating to the nomination of candidates should not be subjected to judicial review. Courts could distinguish between party rules pertaining to the nomination of candidates and rules of internal governance and allow a wider scope of review to the former. Moreover, by assuring a rudimentary level of fairness, judicial review of party rules pertaining to the election of public officials would not necessarily involve the courts in convention-eve intra-party disputes. Party members displeased with internal party governance on matters unrelated to the election of public officers generally should not look to the courts for relief. They can seek self-help within the party structure, join another party, or organize a party of their choice. The courts would probably still be confronted with convention-eve claims of unfairness of rules as applied, but they could abstain from intervention except in the

[333] 409 U.S. 1 (1972).

[334] 95 S. Ct. at 550 (Rehnquist, J., concurring).

[335] 409 U.S. at 5-6.

[336] *Cf.* Sailors v. Board of Educ., 387 U.S. 105 (1967).

most flagrant cases[337] and in situations in which there is sufficient time for judicial deliberation. The appropriate redress for claims of unfairness of party rules respecting internal governance generally should be at the polls. Likewise, the courts will be unable to hear some claims of unfairness of rules, as applied, for three reasons: (1) the lack of sufficient time for review, (2) the inadequacy of judicial remedies, and (3) the need to avoid judicial intervention in the broad range of matters falling within party discretion.

In balance, then, the tradition of judicial nonintervention in party rules relating directly to the election of public officials should be subordinated to a limited extent to the vital public interest in access to the nomination process. Obviously, different judicial standards will be relevant to party nomination rules than have been applied to election laws because different interests are at stake. The availability of competing political groups in our system is the best antidote for party rules, the unfairness of which is not of constitutional dimensions. But the courts are an appropriate forum to insist upon fundamental fairness of party rules respecting the nomination of public officials. The obligation of the party to adopt written rules concerning the nomination of public officials, the right to adequate public notice of all nominating caucuses leading to the selection of public officials, the right of reasonable access to party membership lists prior to caucuses, the right of party members to speak and to vote at such caucuses, and the right to have votes counted fairly should, at least, be comprehended by due process of law. If a party wishes to go further, it may. But it is clear that due process neither commands nor forbids affirmative action to increase participation by youth, women, and minorities in closer proportion to their distribution in the population or party membership. Due process neither commands nor forbids assignment of votes to districts by one-person/one-vote or one-party-member/one-vote standards. Nor does due process appear to affect the bonus a party may wish to assign for favorable votes in preceding elections.

Justice Powell's concern that the citizens of a state should not be represented at national nominating conventions "by delegates who have been rejected by these citizens in a democratic election"[338] is well-placed. One danger implicit in the primacy of party rules over state law is that party rules are especially susceptible to manipulation by political insiders. Thus, it appears

[337] *Cf.* Younger v. Harris, 401 U.S. 37 (1971) (bad faith or harassment by prosecution necessary to support federal intervention with state law enforcement efforts).

[338] Cousins v. Wigoda, 95 S. Ct. 541, 552 (1975) (Powell, J., concurring in part and dissenting in part).

essential that the Court, having declared the primacy of national party rules over state laws, require that national party rules pertaining to presidential nominations be consistent with due process and that they be so administered to the extent that judicial accountability is appropriate or possible under the circumstances. To the extent that Justice Powell's opinion would allow a national nominating convention to seat whomever it pleased as at-large delegates, it should be disapproved. The seating of at-large delegates, unless in conformity with fair party rules, would unreasonably dilute the votes of other delegates.

The national political parties must pay with judicial accountability for the primacy of their rules over state law in matters relating to the seating of delegates. The holding in *Cousins* would be indefensible unless national party rules respecting the nomination of presidential and vice-presidential candidates were subject to judicial review for their fundamental fairness.

The perspective from which the courts should consider the fairness of national political party rules respecting nomination of presidential candidates was properly established in *O'Brien*. Judicial intervention should be approached "with great caution and restraint" because the circumstances often involve "relationships of great delicacy."[339] The courts should deliberately balance the gravity and urgency of the need for affording judicial relief and the effectiveness of judicial remedies against the intrusive impact of a court decree upon the delicate first amendment associational rights of political parties and their adherents. Moreover, political parties should have "wide latitude in interpreting their own rules and regulations."[340]

It has been suggested that *Cousins* implies the need for judicial accountability of rules of national political parties respecting nomination of public officials. This argument applies with equal force to the party rules governing nomination of United States Senators and Representatives. The people will remain free to assert their sense of civic responsibility, their economic interests, or their personal prejudices in the nominating process. The important thing is that the nomination process, like the election which follows, should be fairly organized to allow maximum effective popular participation.

Most states have extensive legislation regulating the nomination of public officials and the organization of political parties. How disruptive will *Cousins* be of the vast systems of state regu-

[339]O'Brien v. Brown, 409 U.S. 1, 4 (1972).

[340]Keane v. National Democratic Party, 469 F.2d 563, 569 (D.C. Cir. 1972). The latitude "must be especially wide where, as here, a reviewing court is hampered by severe shortage of time which prevents a prolonged inquiry into the meaning of rules." *Id.*

latory legislation? Initially, it should be recalled that *Cousins* does not apply to political party rules of internal governance.[341] Presumably, state legislation respecting party rules of internal governance is not affected by *Cousins*. It will generally be possible to construe party rules so that they do not conflict with state law.[342] Only when the conflict between party rules and state laws is unavoidable do party rules displace state law. The primacy of national party rules respecting the nomination of presidential candidates, like federal common law, is interstitial in character. The vast amount of state legislation not in conflict with national party rules governing the nomination process remains intact and is unaffected by *Cousins*.

VIII. Conclusion

Despite its recency, the federally secured right of political participation is now established. It extends both to voting and to political candidacy. Although an important new source of political rights, this federal right does not disparage the substantial residual authority of the states to control their electoral processes.

The right to a place on the ballot is not absolute; it is limited to candidates who can demonstrate substantial public support. The right is not available to disgruntled partisans who, as "sour-grape" independent candidates, would subvert the legitimate state interest in a viable partisan primary system. But the right is incontestably available to genuine, independent candidates who wish to seek elective office within or without the structure of established political parties. Conclusive presumptions, such as those inherent in filing fees, which bar the candidacy of otherwise qualified candidates for public office, have become suspect and are subject to strict scrutiny. Other restrictions, such as property ownership, are invalid since they fail even to meet the less stringent reasonable basis test of equal protection.

The states retain enormous residual authority to establish and maintain independent electoral systems. Nothing in recent decisions establishing a federally secured right of political candidacy even remotely threatens to impose a federal straightjacket on the diverse electoral systems of the several states. There is plenty of room, even after the limited federal right to be a candidate has been secured, for the states and localities to let a thousand flowers bloom. The Court's recognition and vindication of a limited, federally secured right of political candidacy has been characterized by judicial statesmanship of the first magni-

[341] *Compare* Lynch v. Torquato, 343 F.2d 370 (3d Cir. 1965).

[342] *See, e.g.*, Keane v. National Democratic Party, 469 F.2d 563, 572 (D.C. Cir. 1972).

tude. Nowhere is the obligation of the Court greater than in assuring that the political deck is not stacked, and that the rules of the game are fair. By asserting federal authority to assure fundamental fairness in access to the political system, the Court is responding to the growing demand of our society for a more open, truly democratic political system. Ironically, the larger federal judicial role in state electoral affairs to secure equality of access to the political system may ultimately permit even greater federal judicial deference to the political decisions of state and local institutions. To the extent that various exclusionary structural barriers may have frustrated popular efforts to elect responsive state and local officials in the past, the increased federal judicial role should be welcomed by citizens who support vigorous state and local government.

The emergence of a federally secured right of political participation has paralleled the growing national consensus for universal adult access to and participation in the political system. The Court has both mirrored the times and prodded society in the direction in which it was already moving. The inability of opponents of *Baker* to reverse the one-person/one-vote ruling by constitutional amendment bears witness to the fact the the Court's voting decisions, even the most controversial ones, have not substantially disparaged the Court's legitimacy or wasted its scarce resources. Moreover, the Court's response to widely perceived popular needs in the voting area has probably enhanced popular approval of the Court and strengthened its legitimacy. Although the recent judicial trend does pose serious questions relating to federalism, the Court has invalidated significant intrusions on the rights of voting and political candidacy on federal grounds without impinging on legitimate state interests in developing political systems responsive to state needs. The Court's recent posture in the voting rights area evidences an appropriate level of federal judicial respect for state political institutions. The Court's restraint, however, has been tempered by its willingness to cast aside archaic state practices that are unreasonable and inconsistent with a democratic polity.

Comment

Tax Planning With Restricted Stock

WARREN E. BANKS*

I. INTRODUCTION

A series of well-formulated guidelines exist for employers who wish to benefit their employees through the use of qualified stock option plans. The advantages of these plans include a deferral of taxation until the ultimate sale of the stock and capital gains treatment.[1] Rather than re-examine the foregoing, this Comment will analyze Internal Revenue Code section 83[2] and will consider stock options or other stock purchase plans established to provide benefits free of the constraints of qualified plans. These plans, for example, may arise when an employer transfers restricted stock to an employee without cost or at a discounted price. Under section 83, this form of transfer will result in unrealized gain to the extent of the difference, if any, between the fair market value and the purchase price of the stock. The gain will be realized either upon an immediate election or any ultimate transfer or

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[1]INT. REV. CODE of 1954, § 422; Treas. Reg. §§ 1.422-1, 1.422-2. Employee interest in qualified plans could be adversely affected by recent disenchantment with the stock market. For example, on September 30, 1974, the Dow Jones Industrial Average had fallen to 577.60, only 5.8 times the per share earnings of the thirty companies represented. These figures were down from 838.05 and 9.4 times earnings for the same date twelve months earlier. Wall Street Journal, Dec. 9, 1974, at 25, col. 5.

[2]It is true that this legislation, passed in 1969, is not limited in its application merely to stock or to an employer-employee relationship, so that the present inquiry must necessarily be viewed as a selective one. For example, the section purports to deal with any circumstance in which "in connection with the performance of services property is transferred to any person other than the person for whom such services are performed . . . ." INT. REV. CODE of 1954, § 83(a). A company issuing new shares of its own stock might need to avoid a bargain sale at less than par or perhaps the issuance of stock for future services. N. LATTIN, THE LAW OF CORPORATIONS 467-83 (2d ed. 1971). If so, the use of no par shares, treasury shares, or even shares in another company are alternatives.

forfeiture of the stock. Under this section, therefore, it still is possible to defer a taxable event beyond the granting or exercising of a stock option, although the resultant gain will emerge as ordinary income. It is also true that present tax planning under section 83 is hampered somewhat by a shortage of administrative and judicial guides,[3] and those few that exist tend to emit more heat than light. Nevertheless, despite some of the uncertainty associated with its use, restricted stock under section 83 has a viable role to play in an option agreement. It is advisable for the tax planner, therefore, to remain or become aware of its characteristics. The purpose of this Comment is to assist the tax planner in this effort.

II. Scope of the Problem

Section 83 creates a deferral procedure by which stock, which is nontransferable and is subject to a substantial risk of forfeiture, may escape taxation until one or the other of these limitations ceases to exist.[4] It also deprives the taxpayer of a prior advantage of reporting as income the *lesser* of the difference between the cost of the stock transferred and either the fair market value of the stock at its acquisition or the fair market value at the lapse of a restriction affecting the stock's value.[5] At first it may appear that the new section has no relevance to stock options because it is expressly inapplicable to transfers of options without a readily ascertainable fair market value.[6] Similarly, it is

[3]At this writing, proposed regulations have existed for some time so that the reader should be alert to any changes in them that might be forthcoming.

[4]Int. Rev. Code of 1954, § 83(a). This stock might be obtained through the exercise of an option. Although both limitations must exist, the section provides that if a substantial risk is present, the stock will be considered as nontransferable. *Id.* § 83(c). To make certain the agreement is carried out, however, the planner may wish to mark the stock certificates with notice of the restrictions or perhaps to place the certificates in escrow. For an extended treatment of section 83, including the pre-section 83 rules, *see* Hindin, *Internal Revenue Code Section 83 Restricted Stock Plans*, 59 Cornell L. Rev. 298 (1974). *See also* Note, *Stock Options and the Tax Reform Act of 1969: The Question of Continued Utility*, 26 Vand. L. Rev. 1261, 1282 (1973); Comment, *Property Transferred in Connection with Performance of Services under Section 83—Effectuation of Tax Reform Act Purposes*, 17 Wayne L. Rev. 1267 (1971).

[5]Treas. Reg. § 1.421-6(d)(2); Kopple, *Restricted Stock: What's Left After the Tax Reform Act of 1969?*, 48 Taxes 558, 559 (1970). In general, the section is effective for property transfers, in connection with performance of services, made after June 30, 1969, except for transitional situations not relevant to this Comment. Int. Rev. Code of 1954, § 83(i).

[6]Int. Rev. Code of 1954, § 83(e)(3). It also is specifically inapplicable to qualified stock options and to certain transfers involving trusts and annuities. *Id.* § 83(e)(1), (2).

specifically inapplicable to a transfer of property pursuant to exercise of an option with a readily ascertainable fair market value.[7] These last two exclusions, together with the failure further to exclude, suggest that the section *is* applicable to the transfer of property pursuant to the *exercise* of an option without a readily ascertainable fair market value. Thus, the effect of section 83 is important to one who wishes to construct a nonstatutory option plan.[8]

A troublesome problem one first must confront is making certain the property is actually "transferred" so that the transaction falls within the ambit of section 83. For example, if the stock is purchased and the price is paid in whole or in part with a nonrecourse obligation which does not result in personal liability, the transaction will fail, wholly or partly, to come within the scope of the rules until payment is made.[9] Thus, the draftsman perhaps will wish to rely upon a debt instrument evidencing personal liability on the part of the acquirer if full cash payment is not to be made. This raises the question of whether a "purchase" must exist for section 83 to apply or whether bonus stock is outside the scope of the new law. Proposed regulations offer three confusing examples, two of which seem to involve the lack of a purchase and result in no transfer,[10] and one of which involves a purchase and results in a transfer.[11] Of course, in the two examples which appear to involve bonus stock,[12] the trans-

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[7] *Id.* § 83(e)(4).

[8] Apparently, the taxable event will occur at transfer of the property even though the option acquires a readily ascertainable fair market value between its grant and its exercise. Proposed Treas. Reg. § 1.83-7(a)(2), 36 Fed. Reg. 10793 (1971).

[9] Proposed Treas. Reg. §§ 1.83-3(a)(1), (2) example (2), 36 Fed. Reg. 10790 (1971). Schapiro, *Proposed Treasury Regulations under Code Section 83*, 25 THE TAX LAWYER 281, 283 (1971).

[10] Proposed Treas. Reg. § 1.83-3(a)(2) examples (1) & (3), 36 Fed. Reg. 10790 (1971). The first example seems to illustrate bonus stock to be repurchased at the excess, if any, of book value upon termination of employment over book value at the time of purported transfer. The third example seems to illustrate bonus stock to be repurchased for declared and unpaid dividends since the time of purported transfer. Neither appears to be subject to a restriction that carries a specific time limitation other than the undetermined term of employment. Further, both are utilized as examples of situations in which no transfer has occurred.

[11] Proposed Treas. Reg. § 1.83-3(a)(2) example (4), 36 Fed. Reg. 10790 (1971). In this example a sale at one-half of book value to be repurchased at three-fourths of book value at an undetermined time of termination of employment was said to be a transfer within the meaning of section 83 because a shareholder acquired a valuable right that could increase or decrease during the employment.

[12] Proposed Treas. Reg. § 1.83-3(a)(2) examples (1) & (3), 36 Fed. Reg. 10790 (1971).

actions seem to have failed as "transfers" primarily because the stockholders were protected from any downside risk of loss.[13] The stock transferred without a purchase is shown in at least one other example, however, to be potentially within the scope of section 83.[14] Because of this ambiguity, it may be unnecessarily conservative to avoid fully the use of bonus stock. On the other hand, requiring a minimal payment may set a planner's mind at ease as well as raise capital for the company. At the very least, an attempt should be made to assure that the holder of the stock has a chance of loss as well as an opportunity for gain. Requiring a payment is a certain way to assure that the stockholder bears the risk of a potential loss. Avoidance of the fact situations described in the regulatory examples, both of which are badly in need of clarifying revision, is also an obvious precaution.

III. Semantic Issues

Although the term "substantial" appears in several places in the Code, section 83(c)(1) perhaps best illustrates the multiple meanings of the term. In what could be either a definition or an illustration of a substantial risk of forfeiture, Congress provided in section 83(c)(1) that such a risk will exist if rights to the property's full enjoyment depend upon an individual's performance of "substantial services." Taken literally, the substantiality of the services yet to be performed would be the sole test of the substantiality of the risk.[15] If this were so, presumably the only factual issue to be resolved would touch upon items such as the difficulty of the services, the length of time over which they are to be performed,[16] and the length of an employee's expected working career after the lapse of the restriction.[17]

[13]In the first example, the shares may have increased in book value, but the stockholder stood to lose nothing. In the third example, the stockholder might have received dividends if they were declared but again stood to lose nothing if none were declared. Schapiro, *supra* note 9, at 287.

[14]Proposed Treas. Reg. § 1.83-3(c)(2) example (2), 36 Fed. Reg. 10791 (1971) (shares transferred in connection with services and released from a forfeiture restriction in installments over a ten-year period). One author, however, has commented that the effect of regulations illustrating transfers "may" be to deny section 83 treatment to bonus stock. Kopple, *Proposed Regs on Section 83: An Analysis of the Remaining Planning Possibilities*, 35 J. Taxation 130, 132 (1971).

[15]Proposed Treas. Reg. § 1.83-3(c)(1), 36 Fed. Reg. 10790-91 (1971), uses the substantial services language of the section though it also contains other examples, yet to be mentioned, that suggest "service" is not the only relevant yardstick. Apparently the history of the legislation also suggests that there may be risks other than those related only to service. Schapiro, *supra* note 9, at 290 n.7.

[16]Proposed Treas. Reg. § 1.83-3(c)(1), 36 Fed. Reg. 10790-91 (1971), notes that "regularity" and "time spent" are probative of substantiality. Fur-

It is arguable that section 83(c)(1) means only what it expressly states. If a substantial risk may exist without the need for substantial services, however, then a much clearer description of substantial risk is needed. For example, the proposed regulations[16] add to section 83 and indicate that forfeitures, either because of the commission of a crime or upon the breach of an enforceable covenant not to compete, would not be substantial risks. The latter case is qualified by taking into consideration such matters as the covenantor's age, the availability of other job opportunities, and the *likelihood* of obtaining other employment and is illustrated by an employee who buys stock on the termination of his employment and who has a good chance of obtaining a competing position and thereby forfeiting the shares. In this situation, his stock *would* be deemed to include a substantial risk under the proposed regulations.[19] Although the forfeiture is not conditioned upon the performance of substantial future services, these additions seem to indicate that it still is possible for stock to contain a substantial risk of forfeiture. Pinning the forfeiture upon commission of a crime or upon the breach of a covenant not to compete, however, is normally not the advisable method. In this regulatory emphasis upon the likelihood that an employee can succeed in his efforts to compete, and in the exclusion of the crime-forfeiture as a substantial risk, the Internal Revenue Service has clearly shifted from "substantial services" with its connotation of "how much" toward "substantial risk" with its connotation of "probability." In other words, a substantial risk exists if substantial services, however measured, must be performed. In the

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ther clarification, however, would help. For example, would seasonal work, part-time work, or full-time work also be relevant? At least a restriction extending over ten years seems to be long enough to qualify as substantial services. Proposed Treas. Reg. § 1.83-3(c)(2) example (1), 36 Fed. Reg. 10791 (1971).

[17]This is similar to the old collapsible corporation dispute whether one should consider the income realized or *not yet* realized of primary importance in deciding if a "substantial part" of income has been earned within the meaning of INT. REV. CODE of 1954, § 341. *Compare* Commissioner v. Kelley, 293 F.2d 904 (5th Cir. 1961), *with* Abbott v. Commissioner, 258 F.2d 537 (3d Cir. 1958). Though an argument based upon this premise may be intriguing, section 341 criteria could be distinguishable since that section speaks of "substantial part" of a whole while section 83 speaks of "substantial services." If services to be performed after the lapse are relevant, an employee's advanced age could penalize him. Nevertheless, employee age has been made relevant in the proposed regulation's criteria to determine whether or not a covenant not to compete is a substantial risk. Proposed Treas. Reg. § 1.83-3(c)(1), 36 Fed. Reg. 10791 (1971).

[16]Proposed Treas. Reg. § 1.83-3(c), 36 Fed. Reg. 10791 (1971).

[19]*Id.* § 1.83-3(c)(2) example (4).

alternative, a substantial risk exists if there is a "probability," however measured, that a forfeiture will result.[20]

Of course, the exact dimensions of a "substantial risk" might be clarified by legislative enactment, judicial opinion, or administrative regulation. In the interim, however, a conservative tax planner seeking a section 83 deferral of tax may wish to consider using, whenever possible, only those provisions that attempt to establish a substantial service requirement.

"Forfeiture" is another term in need of further clarification. The word suggests a loss, but the amount of sacrifice needed to constitute a forfeiture and transform shares into restricted stock is conjectural. In an example in the currently proposed regulations, a taxpayer is assumed to purchase stock at $10 and to sell back at $10 if he quits within ten years.[21] This illustration in the regulations seems to indicate that a refund of the amount paid at the original exercise of an option would not prevent the return of the property from constituting a forfeiture. Thus, it appears to be unnecessary that a taxpayer lose money on the transaction but rather that he merely forego his right to "full enjoyment of the stock."[22] If a stockholder sacrifices his interest in the shares, therefore, presumably it would be satisfactory for his employer to refund even a lesser sum, such as $8, $6, or even nothing, provided that the amount is equal to the original cost or less. The regulatory examples, however, continue to emphasize that a corporate purchase of bonus stock at its attained fair market value would *not* constitute a forfeiture.[23] Notably, this example is distinguishable since it involves stock for which the taxpayer paid

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[20]It has been implied that the crime exclusion exists because an employer normally would not hire someone if there is a probability he will commit an offense. This suggests it is the perceived likelihood that is important, since it is common knowledge that most employees do not turn out to be criminals. Zimet, *Property Transferred in Connection With the Performance of Services*, S. CAL. 1971 TAX INST. 149, 160. The probability in the covenant not to compete rationale seems to be a perceived one as well. At the time of the contract or transfer of the property, questions of an employee's age and his likelihood of successfully breaching are relevant. If this analysis is correct, it would seem that a later and actual commission of a crime or successful breach of a covenant would not be relevant as to the question of whether or not a substantial risk of forfeiture existed at time of contract. Thus, an actual forfeiture would not prove that a substantial risk of it existed.

[21]Proposed Treas. Reg. § 1.83(c)(2) example (1), 36 Fed. Reg. 10791 (1971).

[22]INT. REV. CODE of 1954, § 83(c)(1). The forfeiture showing a refund of dollar for dollar can involve an economic loss, such as a sacrifice of dividend income or capital appreciation, if applicable, or of the right to future participation in any perquisites associated with stock ownership.

[23]Proposed Treas. Reg. § 1.83-3(c)(2) example 3, 36 Fed. Reg. 10791 (1971).

nothing rather than optioned stock for which the taxpayer received a refund of cost. Presumably, a payment of fair market value would make the taxpayer whole in terms of the economic sacrifice brought about by his surrender of the shares. Although he still would be deprived of the full enjoyment of the property, the payment of its full value allegedly would ease the discomfort and prevent the transaction from constituting a forfeiture. Thus, payments from the employer would seem to have more relevance when they exceed rather than fall at or below employee cost. The regulations, however, continue to confuse this matter by stating that a risk of forfeiture generally will not exist if an employer is required to pay full or "substantially" full value on return of the property.[24] It would seem likely, therefore, that a payment of more than original cost would not necessarily impair the effectiveness of a forfeiture provision so long as the payment is less than the substantial full value. One can only guess, however, where the cross-over payment point lies between original cost and later fair market value. Pending clarification, if a deferral is sought, the prudent draftsman may wish to limit payments to a refund of cost or less. Surely it would be unwise for him to establish repayment at fair value.

Meanwhile, many questions remain to vex the tax planner. For example, suppose that a stockholder paid $10 per share for stock with a fair market value of $15 and only a refund of cost was required. What would be the Service's position if the fair market value later fell to $8 at which time the taxpayer breached and redelivered the stock and collected a refund of his $10 cost, $2 in excess of the prevailing fair market value? Would the receipt of more than the fair market value somehow emasculate the risk of forfeiture provision and throw the tax back into the year of original acquisition? Of course, the matter would be moot if the Service were to confine itself to a prospective view of these agreements, as the parties must do. Moreover, one way to circumvent the problem would be to require a return of the shares

[24] Proposed Treas. Reg. § 1.83-3(c)(1), 36 Fed. Reg. 10790-91 (1971). The question remains whether there is a risk of forfeiture or not upon bonus stock if the employer is required to pay *anything* back. The regulations refer to fair value repayments, but if the taxpayer has paid nothing for the shares, any payment he receives would be a gain. The same question exists for stock acquired through an option if the taxpayer is to receive back a peppercorn over cost. Though the answers apparently are not certain, it would seem that the proposed regulations are aimed principally at the receipt of substantially full value for the stock that is given up, so that receipt of some amount over cost or something more than zero for bonus stock would not necessarily destroy the effectiveness of the forfeiture provision. Administrative clarification of the point, however, is very much needed. *See* Kopple, *supra* note 14, at 132.

and to provide for no refund at all, although this might be unacceptable to the person acquiring the restricted stock.

IV. Electing an Earlier Tax

Section 83 appears to provide a choice to the initial recipient of restricted stock. He may defer taxation to a time when either the substantial risk of forfeiture or the nontransferability feature disappears, and then report as ordinary income the excess of the attained fair market value over the cost.[25] Alternatively, he may elect to include the excess in his gross income for the year during which he acquired the stock.[26] In the latter case, the stockholder will report the excess as gross income in the taxable year of the election, and the transferor corporation can deduct the excess amount during the taxable year in which or with which the stockholder's year ends.[27]

The elective provision provides the stockholder with some obvious flexibility in reporting his taxable income as well as control over his corporation's entitlement to a section 162 deduction. This is especially true in a continuing plan that permits stock acquisitions over a period of years. Not only does a stockholder control the year of the deduction, but he may also be able to report income in one tax year and delay the corporate deduction until the next tax year. For example, assume that a shareholder is on a calendar year and his corporation is on a fiscal year ending October 31. If a calendar year shareholder elected to report income realized from a stock transfer during 1974, his tax payment would be due by April 15, 1975.[28] However, the corporation's fiscal year coinciding with the close of the individual shareholder's calendar year would end October 31, 1975, and the section 162 deduction would be deferred until the next filing date, January 15, 1976.[29]

At first it may appear senseless for a taxpayer to forego the deferral feature of section 83 and accelerate the payment of a tax on ordinary income. The earlier disbursement of cash for payment of the tax and the loss of the ability to earn interest on the amount disbursed raise questions about the wisdom of such an election. An explanation lies, however, in a taxpayer's expectation regarding the likelihood of the future capital appreciation of

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[25] Int. Rev. Code of 1954, § 83(a).

[26] *Id.* § 83(b); Proposed Treas. Reg. § 1.83-2, 36 Fed. Reg. 10789-90 (1971).

[27] Int. Rev. Code of 1954, § 83(h).

[28] *Id.* § 6072(a).

[29] *Id.* § 6072(b). The importance of all this may be minimal to the company, but if it should demand current deductions, perhaps the firm should avoid use of the deferral technique. Could the firm and the stockholder effectively agree that the latter would waive his right to elect under the statute?

his stock. If he were to forego the election, the entire excess of the later fair market value over the original cost of the stock would be taxed as ordinary income at the time the restrictions lapse. If an election were made, however, the amount of ordinary income would be measured by the excess of the fair market value over the original cost at the time of the election, and a new basis, consisting of cost increased by the amount taxed, would generally be used to measure the gain on a subsequent sale. This gain could then be treated as a capital gain rather than ordinary income.[30] Thus, the taxpayer must weigh the expected costs of each alternative.

Methodology for measuring the costs and making the decision whether to elect presumably should be based upon conventional financial criteria that discount future cash outflows to their present values for purposes of present comparative analysis. In this manner the smaller of the two present values can be selected. For example, suppose that a taxpayer exercises an option to buy restricted stock which has a fair market value of $10 per share for the bargain price of $8 per share. Assume that his marginal tax rate is 40%, that the substantial risk of forfeiture will lapse in ten years, that he plans to sell the stock after the lapse, and that he expects the value of the stock to rise to $12 by that time. Under these assumptions, the taxpayer could elect to pay a current tax per share in the amount of $.80[31] and then pay a capital gains tax in the tenth year in the amount of $.40.[32] Alternatively, the taxpayer could wait ten years until the restriction lapsed and

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[30]Proposed Treas. Reg. § 1.83-2(a), 36 Fed. Reg. 10789 (1971). The section purports to disallow the elector any deduction for loss should the stock later be forfeited. INT. REV. CODE of 1954, § 83(b). The proposed regulations, however, seem to stretch this point to allow a deduction equal to the amount paid for the stock over the amount realized. Proposed Treas. Reg. § 1.83-2(a), 36 Fed. Reg. 10789 (1971). For example, suppose a taxpayer buys restricted stock at $10 while its fair market value is $15, and he elects to pay a current tax. His new basis is $15 and, if fair market value remains at that level until such time as a complete forfeiture later occurs, section 83 seems to say no deduction would be allowed for the $15 loss of value or the $10 loss of original cost. The proposed regulations, however, seem to imply that there would be a deductible capital loss in the amount of $10. Proposed Treas. Reg. § 1.83-2(a)(1) & (2), 36 Fed. Reg. 10790 (1971). This apparently has been criticized for its failure to allow the full $15 economic loss. Schapiro, *supra* note 9, at 295. It is arguable that a literal reading of the statute suggests no deduction of any kind so that the drafters of the proposed regulations may already have gone farther than might be expected.

[31]$10 minus $8 (which equals $2 of ordinary income) times 40% equals $ .80.

[32]The expected fair market value of $12 minus $10 (which equals $2 of long-term capital gain, only half of which is taxable at ordinary income rates) times 50% equals $1 times 40% equals $ .40.

pay an ordinary income tax of $1.60.[33] Thus, the total tax outlay with an election is $1.20, including an $.80 tax on ordinary income and a $.40 tax on capital gains. By comparison, the total tax outlay without the election is $1.60[34] of ordinary income tax.

Although it might appear that making the election is the less expensive choice, failure to consider the present value of the tax outlay in the tenth year distorts the entire decision process. The election's requirement that $.80 be paid immediately deprives a taxpayer of the use of that amount for the entire ten years and results in an additional cost to him. Similarly, deferring a tax to the tenth year permits the taxpayer to employ the funds profitably elsewhere and reduces his effective tax cost. The usual manner for placing cash outflows into comparable time periods is to discount future payments and to provide a resultant present value. In other words, the future tax payments would be stated in their current equivalents: amounts that, if invested by the taxpayer at whatever rate he could expect to earn, would accumulate to the sums needed to pay the alternative taxes at the end of ten years.[35]

Thus, assume that a stockholder could earn 6% after taxes if his excess funds were invested. A present value table represents the present worth of $1 to be paid ten years in the future as $.558.[36] Stated another way, if $.558 were invested at a 6% after tax compound interest rate, it would accumulate to a sum of $1 over ten years. After ascertaining the ten year equivalent of $1, one needs only to multiply this equivalent by the actual amounts that are expected to be disbursed in ten years.

In the no-election alternative, ordinary income tax of $1.60 payable in ten years has a present equivalent value of $.8928.[37] In the election alternative, the capital gains tax of $.40 payable in ten years has a present equivalent value of $.2232.[38] Of course, the present value of $.80 in income tax payable now under the election is $.80. Thus, stated in equivalent dollars, the election will have a total effective tax cost of $1.0232, including an $.80 tax on present ordinary income and a $.2232 tax on future capital gains. In contrast, the no-election alternative will have a tax cost of $.8928 of future ordinary income tax. It would be less expensive,

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[33]$12 minus $8 (which equals $4) times 40% equals $1.60.

[34]For simplicity, the example ignores expenses from the exercise of the election, stock sales, and other sources.

[35]The entire discounting process is illustrated in Banks, *A Selective Inquiry into Judicial Stock Valuation*, 6 IND. L. REV. 19, 38 (1972).

[36]V. BRUDNEY & M. CHIRELSTEIN, CORPORATE FINANCE—CASES AND MATERIALS 35 (1972). Tables similar to those in the Brudney book are usually available at local banks.

[37].558 times $1.60 equals $ .8928.

[38].558 times $ .40 equals $ .2232.

therefore, *not* to make the election. Significantly, this conclusion is precisely opposite from that suggested when not using a discounting process.

It is true that monetary differences may seem small[39] and that assumptions and estimates are difficult to formulate and may not hold true.[40] Nevertheless, an informed planner should attempt to quantify the elements of his decision in a similar fashion. Otherwise, the process of making a choice in a section 83 circumstance would disintegrate into nothing more than a random selection.[41]

V. Perpetual Restrictions

A common purpose for selling restricted stock under a nonstatutory option is to give an employee an equity interest at a bargain price that will induce him to remain in the company's service. Of course, the firm frequently will wish to regain the shares if the employee should decide to terminate the employment relationship. Under the elusive section 83 rules, it has already been shown that stock must meet the technical requirements for a transfer to the recipient and must include a substantial risk of forfeiture. If the company carefully attempts to meet these requirements, but then seeks to impose an obligation upon the employee to resell the shares to the company upon termination of employment, questions arise as to when, if ever, the restriction will cease, and what, if any, will be the effect under section 83. For example, suppose the employee must forfeit his stock by selling it to the company if he leaves its employment within five years. This limitation would seemingly end at a stated time so that employment thereafter would result in ownership without restriction. If so, the taxable event would occur during the fifth

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[39]Altering the discount rate, however, can affect the result so that the decision is greatly dependent upon what alternatives the taxpayer has available for his money. With an expectation of very large capital appreciation in the stock, it is apparent that the decision-making process would favor the election.

[40]A partial solution would be to assign probabilities to the estimates. V. Brudney & M. Chirelstein, *supra* note 36, at 55.

[41]These decision-making criteria could be explored endlessly. For example, only the *difference* between the future tax under each alternative need be discounted. In the above example, at least $ .40 would be due in the tenth year under either alternative. Since this element is common to both choices, it loses its relevance in the decision process and could be subtracted from each alternative. Furthermore, suppose a taxpayer does *not* intend to sell upon lapse of the restriction but instead plans to hold the stock until his death. Under present law, an estate tax, measured upon the fair market value at death or six months thereafter would be due. Int. Rev. Code of 1954, §§ 2031, 2032. This would constitute an additional tax, but since it would be common to both alternatives it also could be dismissed as irrelevant to the

year.[42] If, however, the employee can never become the owner of the stock or transfer it free of limitations, then, as to him, the forfeiture restriction would in effect be perpetual.

Section 83 clearly allows for the existence of a no-lapse feature by requiring its consideration in determining the fair market value of the stock to which it applies.[43] This suggests that attaching such a never-ending restriction would not cause the issuance of the stock to fail as a "transfer" under section 83. Furthermore, the definition of a no-lapse restriction has been narrowed to include the type of situation already suggested: a limitation on a second transfer of the stock which permits the transfer at a formula price and which continues to apply to a subsequent holder of the stock other than the original transferor.[44] Regulatory examples illustrate this situation with an obligatory resale to the issuing company at the attained book value[45] or at a multiple of earnings.[46]

It is generally agreed that the presence of such a no-lapse provision will cause the transaction to be taxed at the time of the original transfer,[47] and, though the rationale for the timing of the tax is not abundantly clear, the examples so indicate. Since both the examples involve repurchases that could result in a substantial gain to a shareholder, the explanation may be that the stock lacks a substantial risk of forfeiture for that reason. In the alternative, the explanation may be that any no-lapse provision "standing by itself will not be considered to result in a substantial risk of forfeiture."[48] Under either approach, the difference be-

election decision. However, suppose the Treasury should succeed in imposition of a capital gains tax at death? Such an incremental tax should be integrated into the decision process because its effect would be different under each alternative. Of course, all this would raise the problem of determining the year in which the proposed tax on capital gains at death would occur. Since the decision must be made currently and since it would require an estimate of the year of death, perhaps a mortality table would be a useful tool in approaching one of the many problems inherent in the decision process.

[42]Proposed Treas. Reg. § 1.83-3(c)(2) example (1), 36 Fed. Reg. 10791 (1971).

[43]INT. REV. CODE of 1954, § 83(a)(1).

[44]Proposed Treas. Reg. § 1.83-5(a), 36 Fed. Reg. 10792 (1971). This somewhat restrictive definition is in curious contrast to section 83 that speaks of "a restriction which will never lapse, and which allows the transferee to sell such property only at a price determined under a formula . . . ." INT. REV. CODE of 1954, § 83(d)(1). The statutory term "and" arguably suggests that there might be other no-lapse restrictions that do not require a sale only at a formula price.

[45]Proposed Treas. Reg. § 1.83-5(d) example (1), 36 Fed. Reg. 10792 (1971).

[46]*Id.* § 1.83-5(d) example (2).

[47]Schapiro, *supra* note 9, at 288.

[48]Proposed Treas. Reg. § 1.83-3(c), 36 Fed. Reg. 10790-91 (1971). *See*

tween cost and fair market value[49] should be included in income in the "first taxable year in which . . . the property is . . . not subject to a substantial risk of forfeiture . . . ."[50] Of course, this would be the year of the initial transfer of the shares. In any event, the no-lapse regulations could be improved by a clarifying revision on this point.

Despite the uncertainty surrounding a no-lapse provision, at least the drafter of a buy-sell agreement has some reasonable assurance that his formula price will serve as a proxy for fair market value.[51] If a compulsory buy-sell agreement with a formula price is desired, however, the company drafting the contract apparently must make a choice between placing a time limit on its right to reacquire or placing the would-be stockholder in the position of paying an immediate tax on the amount of the bargain purchase.[52]

VI. Conclusion

This brief sketch is but a selective inquiry into the use of restricted stock and seeks to illustrate some of the many perplexing problems that face a tax planner who would establish a new nonstatutory stock option or stock purchase plan. Much of the difficulty is caused by a sketchy section 83 and a set of confusing regulations that, at least at this writing, have yet to reach final form. If a revision of these regulations is imminent, some of the problems discussed herein could soon disappear. At most, such a

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generally 2 J. Mertens, The Law of Federal Income Taxation § 11.11c (1974) (comments on legislative history of no-lapse provisions). Presumably, stock might be sold to an employee under a provision for forfeiture at a zero return of cost for ten years and a no-lapse repurchase at a formula price upon termination of employment thereafter. Arguably, the stock would not be subject to a no-lapse provision "standing alone," and the accompanying substantial risk of forfeiture provision would defer the tax for ten years.

[49]Normally, the formula price will be accepted as a measure of fair market value. Int. Rev. Code of 1954, § 83(d)(1).

[50]*Id.* § 83(a)(2).

[51]*Id.* § 83(d)(1). This avoids the tedious task of stock valuation if the shares have no established market. *See generally* Banks, *Present Value and the Close Corporation,* 49 Taxes 33 (1971). It also does away with an otherwise troublesome question of how much to reduce fair market value so that a no-lapse restriction is given effect.

[52]One pair of authors has suggested that an option to repurchase may constitute a substantial risk of forfeiture while a mandatory repurchase will not. Sexton & Boyle, *How Proposed Section 83 Regs Create Traps in Restricted Stock and Stock Option Areas,* 39 J. Taxation 184, 186 (1973). A repurchase at fair value is not considered a no-lapse provision. Proposed Treas. Reg. § 1.83-5(a), 36 Fed. Reg. 10792 (1971). Presumably, a taxable event would occur upon the initial transfer since the requirement of repurchase at fair value would negate the existence of a substantial risk of forfeiture.

change would merely transform this study from an inquiry into a prologue. Thus, even if changes occur or the proposed regulations become final, the prudent planner should nevertheless avoid innovative deviations from the examples contained in any Treasury guidelines until this relatively new area receives the benefit of judicial interpretation.

Notes

The Expanding Availability of Punitive Damages in Contract Actions

Historically, punitive damages have been awarded only in tort actions and, even then, have been subjected to severe criticism as constituting a criminal punishment without the protection afforded by the usual criminal safeguards.[1] Despite such criticism, however, punitive damages have survived and indeed seem to be undergoing a marked expansion into the contract area. For many years fraud, or some other independent tort combined with a breach of contract, would support punitive damages in most jurisdictions. Recently, however, many courts have allowed punitive damages for less serious misdeeds. This Note will explore the modern concept that an oppressive breach of contract may be sufficient in itself to support an award of punitive damages.

Punitive damages have acquired various labels, such as exemplary damages and smart money,[2] but whatever they have been called, they have always been considered the complement of compensatory damages. Compensatory damages are measured against the loss suffered by the victim and have as their objective to make the victim whole. Punitive damages, on the other hand, have no fixed standard; their purpose is primarily to serve as a deterrent, so that the defendant and others will hesitate to repeat the proscribed conduct in the future.[3]

Clearly, compensatory damages also have a punitive effect.[4] Obviously the defendant is punished in a sense when he is forced to pay damages to the plaintiff, and, except in the case of absolute liability, the law will not inflict this punishment unless it is

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[1] C. McCormick, Law of Damages § 77, at 276 (1935) [hereinafter cited as McCormick]; W. Prosser, Law of Torts § 2, at 11 (4th ed. 1971) [hereinafter cited as Prosser]; Morris, *Punitive Damages in Tort Cases*, 44 Harv. L. Rev. 1173, 1176 (1931).

[2] McCormick § 77, at 275; Note, *Exemplary Damages in the Law of Torts*, 70 Harv. L. Rev. 517 (1957).

[3] D. Dobbs, Law of Remedies § 3.9, at 205 (1973) [hereinafter cited as Dobbs]; Prosser § 2, at 9; Morris, *Punitive Damages in Tort Cases*, 44 Harv. L. Rev. 1173, 1184 (1931).

[4] Morris, *Punitive Damages in Tort Cases*, 44 Harv. L. Rev. 1173, 1177 (1931).

justified by the defendant's conduct. The conceptual distinction between compensatory damages and punitive damages lies in the defendant's state of mind.[5] If the defendant is merely negligent, this negligence is sufficient to justify visiting him with the damage he has caused. However, if he is malicious or uncaring, more severe punishment may be warranted. In the latter instance, since an undesirable motive is consciously at work within the defendant's mind, punitive damages may be appropriate and effective in discouraging such conduct. In the case of mere negligence, however, since no conscious motive is at work, it is doubtful that punitive damages would be a very effective discouragement. Therefore, punitive damage awards are never available when only simple negligence is involved.[6]

I. Historical Development

Early common law allowed the jury virtually unlimited discretion in awarding damages. Therefore, it was never necessary to use the label "punitive damages."[7] However, soon after the courts began to require that the damages assessed by the jury bear a close relationship to the victim's loss, it became apparent that in certain circumstances it was desirable to allow the jury to inflict a penalty upon the defendant greater than mere com-

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> It must be shown either that the defendant was actuated by ill will, malice, or evil motive (which may appear by direct evidence of such motive, or from the inherent character of the tort itself, or from the oppressive character of his conduct, sometimes called "circumstances of aggravation"), or by fraudulent purposes, or that he was so wanton and reckless as to evince a conscious disregard for the rights of others.

McCormick § 79, at 280 (footnotes omitted).

> It is usually the defendant's mental state that is said to justify a punitive award against him, rather than his outward conduct. Thus courts have developed a large vocabulary to describe the kind of mental state required—the defendant must be "malicious", "reckless", "oppressive", "evil", "wicked", or guilty of "wanton misconduct," or "morally culpable" conduct. Since all of these words refer to the same underlying culpable state of mind, and since courts have not been at all concerned with any shades of difference that might be found between, say, malice and recklessness, almost any term that describes misconduct coupled with a bad state of mind will describe the case for a punitive award.

Dobbs § 3.9, at 205 (footnote omitted).

[6] McCormick § 79, at 280; Prosser § 2, at 9-10.

[7] McClellan, *Exemplary Damages in Indiana*, 10 Ind. L.J. 275, 279 (1935); Morris, *Punitive Damages in Tort Cases*, 44 Harv. L. Rev. 1173, 1176 n.4 (1931); Note, *Exemplary Damages in the Law of Torts*, 70 Harv. L. Rev. 517, 518-19 (1957).

pensation to the plaintiff would support.[8] At this stage of common law development, the concept of punitive damages began to emerge.

This historical evolution is responsible for the original determination that punitive damages could be awarded in an action based on tort, but not in an action based upon contract.[9] Of course there were other policy considerations involved in this determination, but this clean separation between tort and contract was primarily due to an historical accident. Since it was easier to develop objective standards for measuring the damage caused by breach of a contract than by a tortious injury, the common law courts were able to limit the jury's discretion in contract actions much earlier than in tort actions. By the time the courts recognized the need for punitive damages, the rule forbidding them in breach of contract actions was too firmly established by precedent to be disturbed.

II. Purposes Served by the Award of Punitive Damages

Although punitive damages have frequently been subjected to severe criticism, when properly utilized they provide a valuable judicial tool. Among the theories most frequently offered to justify punitive damage awards are deterrence, compensation, bounty, and vindication.

Deterrence is unquestionably the most frequently stated reason for allowing punitive damages.[10] When an injury is inflicted in a purposeful manner, or with a reckless disregard for the consequences, it may be desirable to discourage such conduct by resorting to punitive damages. As Clarence Morris points out, punitive damages are "ordinarily merely a means of increasing the severity of the admonition of 'compensatory' damages."[11] More severe admonition is especially desirable in what Morris terms "unjust enrichment" cases. A good illustration of the unjust enrichment concept is found in an early Pennsylvania case[12] which involved damages caused by blasting on a railroad right of way. Although the railroad was informed that the blasting was damag-

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[8]Morris, *Punitive Damages in Tort Cases*, 44 Harv. L. Rev. 1173, 1176 n.4 (1931); Note, *Exemplary Damages in the Law of Torts*, 70 Harv. L. Rev. 517, 518-19 (1957).

[9]McClellan, *Exemplary Damages in Indiana*, 10 Ind. L.J. 275, 279 (1935); Note, *Exemplary Damages in the Law of Torts*, 70 Harv. L. Rev. 517, 531 (1957).

[10]See authorities cited in note 3 *supra*.

[11]Morris, *Punitive Damages in Tort Cases*, 44 Harv. L. Rev. 1173, 1177 (1931).

[12]Funk v. Kerbaugh, 222 Pa. 18, 70 A. 953 (1908), *noted in* Morris, *Punitive Damages in Tort Cases*, 44 Harv. L. Rev. 1173, 1185-86 (1931).

ing plaintiff's buildings, the railroad, nonetheless, ignored plaintiff's requests to use smaller charges, apparently feeling that it would be cheaper to pay for the damage than to delay the project by reducing the charges. In assessing punitive damages, the court noted that mere compensatory damages would enable the railroad to force a form of eminent domain upon its neighbors.

In other situations, punitive damages may be necessary to fully compensate the plaintiff. This theory admits the inadequacy of ordinary compensatory damages. As a general rule it may be argued that there are public policy reasons which justify requiring each party to stand his own legal expenses. However, if the defendant's conduct has been particularly censurable, punitive damages determined by shifting the plaintiff's legal costs to the defendant may be desirable. In fact, the trend allowing more frequent recovery of punitive damages has been paralleled by a trend allowing more frequent recovery of attorneys' fees and court costs under the proper circumstances.[13] Both trends are based upon a similar concern—that a person with a legitimate cause of action should not be discouraged from seeking relief because of the prohibitive expenses of litigation, especially if the wrongdoer acted upon an improper motive.

Another justification for punitive damages is that they are a form of bounty. Under our judicial system it is glaringly obvious that a man cannot afford to resort to the courts if his injury is small. In situations involving small claims, punitive damages may serve to encourage an aggrieved person to protest an outrageous act by making the potential recovery attractive enough to justify investing the time and money required.[14] This option also has the advantage of freeing the legal system from total dependence upon governmental bureaucracy for prosecution.[15]

A final justification for the award of punitive damages is vindication. This ancient theory is of questionable value today,[16] but it still retains some life and is supported by some logic. It is reasoned that for particularly outrageous, insulting acts, such as spitting in a man's face,[17] a large punitive damage award may

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[13]Saint Joseph's College v. Morrison, Inc., 302 N.E.2d 865 (Ind. Ct. App. 1973).

[14]PROSSER § 2, at 11; Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173, 1183 (1931).

[15]DOBBS § 3.9, at 221; MCCORMICK § 77, at 276-77; PROSSER § 2, at 11; Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173, 1196 (1931).

[16]Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173, 1198 (1931); Note, *Exemplary Damages in the Law of Torts*, 70 HARV. L. REV. 517, 522 (1957).

[17]Alcorn v. Mitchell, 63 Ill. 553, 554 (1872), *noted in* Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173, 1198 (1931).

salve the victim's hurt pride and dissuade him from taking retaliatory action.

Since the main purpose of punitive damages is deterrence, the defendant's financial condition is an important fact to be considered by the jury in determining how large an award is necessary to provide sufficient discouragement. The jury should consider the compensatory damages and punitive damages as a whole so as not to over-punish the defendant.[18] Traditionally, the jury has been allowed virtually unlimited discretion in determining the amount of a punitive damages award. Appellate courts have been reluctant to interfere without a showing that the jury was influenced by passion and prejudice.[19] A lack of ascertainable objective standards has probably been responsible for the fact that trial judges and reviewing courts seem more reluctant to interfere with a punitive damage award than a compensatory damage award.[20]

Currently, however, there seems to be a shift in attitude. Courts are more willing to bring punitive damages under reasonable judicial controls not limited by a rigid formula.[21] This shift in attitude seems desirable because there is probably more danger that a jury will allow passion and prejudice to influence its judgment in an area with such a debilitating lack of objective standards. Extremely large punitive damage awards are arguably counter-productive. Large awards are seldom needed to perform adequately the deterrence function, whereas excessive awards may cause judges to be overly cautious in allowing punitive damages at all. In other words, greater control over the size of punitive damage awards hopefully will result in more frequent allowance of punitive damages, although the average size of the award might be smaller. It is often said of criminal penalties that the certainty of punishment has more deterrent effect than the severity of punishment.[22] The same argument would seem to be true for civil deterrence.

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[18]Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173, 1188 (1931).

[19]DOBBS § 3.9, at 204 n.4; MCCORMICK § 85, at 296-98.

[20]Hartman v. Peterson, 246 Iowa 41, 66 N.W.2d 849 (1954); McClellan, *Exemplary Damages in Indiana*, 10 IND. L.J. 275, 276-77 (1935).

[21]DOBBS § 3.9, at 210; PROSSER § 2, at 14.

[22]Mueller, *The Public Law of Wrongs—Its Concepts in the World of Reality*, 10 J. PUB. L. 203, 210 (1961); Singer, *Psychological Studies of Punishment*, 58 CALIF. L. REV. 405, 420-21 (1970). *See also* Bailey & Smith, *Punishment: Its Severity and Certainty*, 63 J. CRIM. L.C. & P.S. 530, 532 (1972), in which reference is made to the dismal failure that resulted from England's eighteenth-century experience with excessive punishment, such as execution for the minor infraction of picking a pocket.

III. Problem Areas

A. *Equitable Actions*

Our legal history has encumbered punitive damages with two frustrating quirks. First, there has been a great deal of reluctance to allow punitive damages in equity actions.[23] Since the ancient rules of equity require that the parties be treated fairly, the argument has been made that punishment has no place in an equity court. This attitude may have been compatible with eighteenth-century attitudes, but the twentieth-century merging of law and equity has greatly eroded any justification for such differentiation. Such a rule is especially frustrating because fraud is the basis for many punitive damage awards, and fraud commonly gives rise to the equitable action of reformation of a contract.

The Indiana courts have avoided the handicap of disallowing punitive damages in an equity action. In *Hedworth v. Chapman,*[24] the Indiana Court of Appeals stated that a court of equity may grant exemplary damages in a proper case. Although this is still regarded as a minority rule, the trend seems to be in the direction of allowing punitive damage awards in equity as well as at law.[25]

B. *Double Jeopardy*

The second quirk involves the double *jeopardy* or double *punishment* problem. The concept of punishing a person in two entirely unrelated actions, one involving a criminal sanction and the other involving punitive damages in a civil action, presents two undesirable features. First, without the proper controls, valuable judicial time will be squandered upon two separate court proceedings. Secondly, without adequate coordination, the two punishments may overly chastise the defendant.

There is a subtle but critical distinction between the theory of double jeopardy and that of double punishment. Double jeopardy is a constitutional bar to a second *criminal* trial for a single act that technically has no application to punitive damage awards in civil actions.[26] Double punishment, on the other hand, is very much involved when punitive damages may be recovered, since it

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[23]Dobbs § 3.9, at 211; Annot., 48 A.L.R.2d 947, 948-49 (1956).

[24]135 Ind. App. 129, 192 N.E.2d 649 (1963).

[25]Dobbs § 3.9, at 211.

[26]Maddox v. State, 230 Ind. 92, 102 N.E.2d 225 (1951); State *ex rel.* Beedle v. Schoonover, 135 Ind. 526, 35 N.E. 119 (1893); Cohen v. Peoples, 140 Ind. App. 353, 220 N.E.2d 665 (1966); McClellan, *Exemplary Damages in Indiana,* 10 Ind. L.J. 275, 281-82 (1935).

is the duty of our judiciary, as the court pointed out in *Taber v. Hutson*,[27] to see that "each violation of the law [is] certainly followed by one appropriate punishment and no more."[28] Most jurisdictions, however, have chosen to ignore the double punishment problem altogether and have merely decided that there is no constitutional double jeopardy problem, because jeopardy is a legal concept that is restricted solely to criminal trials.[29] This approach overlooks the basic unfairness of the double punishment aspect.

In 1854, Indiana made a commendable effort to correct this problem in the case of *Taber v. Hutson*.[30] The court recognized the problem as one of double punishment by stating:

> [I]f the principle of the instruction be correct, Taber may be twice punished for the same assault and battery. This would not accord with the spirit of our institutions. The constitution declares, that "no person shall be twice put in jeopardy for the same offence;" and though that provision may not relate to the remedies secured by civil proceedings, still it serves to illustrate a fundamental principle inculcated by every well-regulated system of government, viz., that each violation of the law should be certainly followed by one appropriate punishment and no more.[31]

This passage indicates that the court realized there was no constitutional question involved, since the court held only that the possibility of being "twice punished for the same assault and battery" would not accord with the *spirit* of our institutions. Nevertheless, the court chose to base its holding on the double jeopardy rather than the double punishment concept. Unfortunately, the leniency allowed by such an approach has become at least as inequitable as the harshness caused by the approach taken in those jurisdictions which ignore the problem.

The basic fallacy is that true double jeopardy acts as a bar to the *second* action, not the first. Thus, when correctly applied, the prohibition against double jeopardy never aids the defendant in avoiding jeopardy completely. As Indiana has applied this concept to punitive damages, however, the civil punishment may be

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[27] 5 Ind. 322 (1854).

[28] *Id.* at 325.

[29] McCormick § 82, at 292; Aldridge, *The Indiana Doctrine of Exemplary Damages and Double Jeopardy*, 20 Ind. L.J. 123 (1945); McClellan, *Exemplary Damages in Indiana*, 10 Ind. L.J. 275, 279 (1935); Morris, *Punitive Damages in Tort Cases*, 44 Harv. L. Rev. 1173, 1195-98 (1931); Note, *Exemplary Damages in the Law of Torts*, 70 Harv. L. Rev. 517, 524-25 (1957).

[30] 5 Ind. 322 (1854).

[31] *Id.* at 325-26.

prevented even though no assurance is offered that the defendant will ever be charged criminally.

The potential for such a problem was recognized in *Taber* when the court noted that, although a defendant is "liable to be punished, a criminal proceeding may not, it is true be instituted against him."[32] Furthermore, *Moore v. Waitt*[33] indicates that our courts are not even concerned about the occurrence of this misguided result. The *Moore* court stated that any *possibility* of criminal prosecution was sufficient to bar punitive damages in a civil action.

The end result of such an approach is the strong possibility that a significant number of wrongdoers will go entirely unreprimanded for unacceptable conduct. Common knowledge of human nature indicates that certain types of undesirable conduct are very unlikely ever to attract criminal prosecution, for example, borderline fraud by the local used-car dealer and leading citizen. This is particularly disturbing because it actually favors criminal activity. In the example mentioned above, for instance, if the used-car dealer does not commit actual criminal fraud, he does not have the protection of "double jeopardy," so punitive damages may be assessed. However, if his actions are serious enough to be criminal, he is protected from civil punishment even though, as the court indicates in *Moore,* it may be virtually certain that no criminal prosecution will follow.[34]

This entire development can be traced to the unfortunate decision in *Taber* to base the prohibition of punitive damages on double jeopardy rather than double punishment. For some reason, the court felt it had the power to establish by judicial fiat that punitive damages could not be assessed against someone in danger of criminal prosecution for the same act; however, the court felt powerless to establish the more logically consistent, and more socially desirable, approach of declaring that *paying* punitive damages would prevent a subsequent criminal punishment for that act. The *Taber* court noted that "the rules of pleading and evidence do not permit a judgment like the present [award of punitive damages] to be set up as a bar to a state prosecution."[35] It should be noted that the suggested alternate approach would allow

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[32] *Id.* at 326.

[33] 298 N.E.2d 456 (Ind. Ct. App. 1973). The court stated:

> [T]his court does not view the rule [disallowing punitive damages if the defendant's act also subjects him to criminal prosecution] as being one based on the probability of criminal prosecution but rather on the possibility of such prosecution.

Id. at 460.

[34] *See* True Temper Corp. v. Moore, 299 N.E.2d 844 (Ind. Ct. App. 1973).

[35] 5 Ind. at 326.

the trial judge to decide when, if ever, a punitive damage award would be paid, thus keeping open the possibility of a criminal trial.

There does not appear to be any reason why the *Taber* court could not have adopted the alternative theory of making the payment of punitive damages a bar to criminal punishment as easily as it adopted the approach of disallowing punitive damages altogether if there is a threat of criminal prosecution. Certainly, the court today could replace the *Taber* rule with a more desirable approach. In considering whether or not to replace the *Taber* rule, the court should not be overcome with sympathy for the defendant who relied on this precedent to protect him from punitive damages for some outrageous act, so long as the court continues to protect him from being punished twice for that act.

If this were a constitutionally mandated double jeopardy situation, there would be a strong policy argument for the approach taken by the *Taber* court. If only one trial is allowed, this opportunity properly should be reserved for the State whether or not the State elects to exercise it. However, double jeopardy is not the problem. Indiana follows the virtually unanimous rule that the only jeopardy sufficient to prevent a criminal prosecution must flow from a previous criminal trial. This rule, which was alluded to in *Taber* and specifically adopted in *State ex rel. Beedle v. Schoonover*,[36] has been accepted without question.[37] It is clear that no civil trial can ever constitute sufficient jeopardy to bar a subsequent criminal trial.

Since there is no constitutional bar to trying the defendant criminally after he has been exposed to the danger of punitive damages, it appears that the way is open for the court to adopt a less disruptive rule that will still accomplish the desired result of not punishing the defendant twice. Perhaps the most obvious solution would be to allow the jury to assess the punitive damage award, but to have the judge suspend execution of the award or hold the money in court until the statute of limitations has run on the criminal offense, thus eliminating any danger of criminal punishment.[38] This approach would accomplish the goal defined

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[36]135 Ind. 526, 35 N.E. 119 (1893). The court stated:

> It is true that section 59, article 1, of the Bill of Rights provides that "No person shall be put in jeopardy twice for the same offense," but the jeopardy mentioned is the peril of a second criminal [i.e., one criminal prosecution followed by a second] prosecution for the same felony or misdemeanor . . . .

Id. at 531, 35 N.E. at 120.

[37]Crim v. State, 294 N.E.2d 822 (Ind. Ct. App. 1973).

[38]In this respect, it is worthy of note that Indiana has already established that punitive damages are recoverable if suit is brought after the statute has run. In Cohen v. Peoples, 140 Ind. App. 353, 220 N.E.2d 665 (1966), the

in *Taber* of not subjecting the defendant to double punishment but would avoid the undesirable side effect of preventing punitive damages when there is actually no danger of any criminal sanction.

Several statutes, both state and federal, have provided for both civil and criminal punishment for the same act.[39] This would certainly seem to indicate that such a policy meets with the approval of the ordinary citizen. In fact, Indiana has provided for punitive damages in the form of triple damages for losses from theft,[40] one of the most common of all crimes. It should be noted, however, that since most statutory punitive damage awards are limited by some formula, such as two or three times the actual damage, the danger of over-punishment is not serious.

All in all, there seems to be adequate justification for the courts of Indiana to adopt a procedure that would accomplish the desirable goal of avoiding double punishment without, at the same time, causing the inequities of our present double jeopardy dilemma.

IV. Where and Why Punitive Damages Are Expanding

A. In Other States

As was noted above, punitive damages have traditionally been limited to tort actions rather than contract actions. Several authorities have stated flatly that except for a few narrowly defined exceptions, punitive damages are inappropriate for an action based on contract.[41] However, it is clear that the courts have always been willing to recognize certain exceptions to this general rule and to add new exceptions when circumstances justified the addition.

One of the earliest and most widely recognized exceptions involved breach of a contract to marry.[42] If seduction is carried

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court held that the jury was entitled to award exemplary damages since the statute of limitations precluded any criminal punishment.

[39]*See* 15 U.S.C. § 1681 (1970); *id.* § 1917 (Supp. III, 1973); Ind. Code § 8-2-13-4 (Burns 1973); *id.* §§ 24-1-2-3 to -7 (Burns 1974); *id.* §§ 25-18-1-20 to -21; *id.* § 34-1-48-19 (Burns 1973); *id.* § 35-17-5-12 (Ind. Ann. Stat. § 10-3039, Burns Supp. 1974).

[40]Ind. Code § 35-17-5-12 (Ind. Ann. Stat. § 10-3039, Burns Supp. 1974).

[41]J. Calamari & J. Perillo, Law of Contracts § 204, at 327 (1970); 5 A. Corbin, Corbin on Contracts § 1077, at 437 (1964); L. Simpson, Law of Contracts § 196, at 394 (1965); Comment, *Exemplary Damages in Contract Cases*, 7 Willamette L.J. 137, 138 (1971); Annot., 84 A.L.R. 1345, 1346 (1933).

[42]Kurtz v. Frank, 76 Ind. 594 (1881); Annot., 41 L.R.A. (N.S.) 840 (1913); McClellan, *Exemplary Damages in Indiana*, 10 Ind. L.J. 275, 279 (1935).

out by a fraudulent promise of marriage, punitive damages have long been deemed appropriate, notwithstanding that the suit is brought in contract rather than tort.

From this early exception, it was an easy step for most courts to allow punitive damages for any contract action involving fraud.[43] This is not to say that fraud satisfied per se the requirement for a sufficiently culpable mental state, but merely that if the defendant's conduct was sufficiently outrageous, punitive damages would be allowed even though the suit was in contract rather than tort. Perhaps the allowance of punitive damages for fraud was thought to be justified by the tort of deceit, because another longstanding exception has been that if a contract breach is sufficiently mingled with an independent tort, the fact that the plaintiff chose to sue in contract rather than tort would not bar punitive damages.[44]

Another of the early exceptions allowed punitive damages for an oppressive breach by a "public utility"[45] such as a water company,[46] a railroad company,[47] a bank,[48] and later, on rare occasions, an employer.[49] This exception is usually justified upon the theory that since the utility is given a favored position by the public, it owes the public a "legal" duty, so that breach of this duty is a tort. However, it also seems important that all these cases have two other things in common. First, the defendants were "big guys" with a great deal of economic leverage, and, secondly, the plaintiffs were "little guys" who could do very little to protect themselves from the defendants' bad faith. In circumstances involving considerable disparity of economic power, punitive damages offer one of the few ways for the court to protect the individual from being trampled upon, and thus to fulfill its responsibility of providing a remedy for every injury it has the power to relieve.

More recently, several courts have allowed punitive damages for oppressive breaches of contract by insurance companies guilty of over-reaching in an attempt to force an unfair settlement on

[43]Wheatcraft v. Myers, 57 Ind. App. 371, 107 N.E. 81 (1914); McCormick § 81, at 289.

[44]J. Calamari & J. Perillo, Law of Contracts § 204, at 327 (1970); 5 A. Corbin, Corbin on Contracts § 1077, at 439 (1964); L. Simpson, Law of Contracts § 196, at 394 (1965).

[45]Dobbs § 3.9, at 206-07; McCormick § 81, at 289-90; L. Simpson, Law of Contracts § 196, at 394 (1965); Note, *Exemplary Damages in the Law of Torts*, 70 Harv. L. Rev. 517, 531-32 (1957).

[46]Birmingham Waterworks Co. v. Keiley, 2 Ala. App. 629, 56 So. 838 (1911).

[47]Jeffersonville R.R. v. Rogers, 38 Ind. 116 (1871).

[48]Woody v. National Bank, 194 N.C. 549, 140 S.E. 150 (1927).

[49]Taylor v. Atchison, T. & S.F. Ry., 92 F. Supp. 968 (W.D. Mo. 1950).

the claimant.[50] An oppressive breach sufficient to justify punitive damages typically involves an unconscionable breach of contract by someone with a great deal of economic power over the other party; it is an attempt to use this economic leverage to force the weaker party to submit to demands supported by no legal or contractual obligation. For example, in *Fletcher v. Western National Life Insurance Co.*,[51] the insured had a sound claim for disability payments, but Western National attempted to force him to waive this claim by threatening, without justification, to sue him for the return of previous benefits paid. By the assertion of pure economic power, with no reasonable color of legal right, Western National attempted to compel Fletcher to give up a valid legal claim against them. Although the insurance company's action did not constitute a recognized tort in the ordinary sense, punitive damages appropriately were awarded. The parallel between the *Fletcher* exception and the earlier ones involving other "big guys" is striking. The court was again required to grapple with a situation in which economic power was used to oppress a "little guy" who had no practical means of defense. If the courts deny punitive damages for such oppression, they are positively encouraging this sort of barbarism.

The justification for punitive damages in the insurance cases is similar to the justification noted in the "unjust enrichment" situation. If punitive damages are denied, such economic oppression will actually be rewarded, because, in the absence of punitive damages, the most serious consequence threatening the company is that it may be forced eventually to pay only what it owed in the first place. Meanwhile, the delay will permit the company to use the contested money at a very favorable rate of interest, and additionally it will permit the company to take advantage of the statistical certainty that a significant number of claimants will be persuaded to give up or compromise their claims.

Although this newest exception began with insurance companies, there seems to be little judicial reluctance to extend it to other oppressive breaches.[52] There are no fundamental differences

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[50]Gruenberg v. Aetna Ins. Co., 9 Cal. 3d 566, 510 P.2d 1032, 108 Cal. Rptr. 480 (1973); Fletcher v. Western Nat'l Life Ins. Co., 10 Cal. App. 3d 376, 89 Cal. Rptr. 78 (1970); Rex Ins. Co. v. Baldwin, 323 N.E.2d 270 (Ind. Ct. App. 1975); Vernon Fire & Cas. Co. v. Sharp, 316 N.E.2d 381 (Ind. Ct. App. 1974); Kirk v. Safeco Ins. Co. of America, 28 Ohio Misc. 44, 273 N.E.2d 919 (C.P. Franklin County 1970). *Contra*, Eckenrode v. Life of America Ins. Co., 470 F.2d 1 (7th Cir. 1972); Cassady v. United Ins. Co. of America, 370 F. Supp. 388 (W.D. Ark. 1974).

[51]10 Cal. App. 3d 376, 89 Cal. Rptr. 78 (1970).

[52]Notice how the courts state their holdings: Gruenberg v. Aetna Ins. Co., 9 Cal. 3d 566, 510 P.2d 1032, 108 Cal. Rptr. 480 (1973); Fletcher

which would cause punitive damages to be more appropriate against an insurance company than against a car dealer or a realtor, for instance. The fact that most of the leading cases awarding punitive damages for an oppressive breach of contract involve insurance companies seems merely to be because insurance companies are more likely to be involved in such suits. Perhaps this is because insurance companies are more likely to use oppressive tactics, or perhaps it is because insurance companies are attractive defendants.

Faced with the obvious injustice of this oppressive type of situation, most courts are discovering ways to extend punitive damages into this new exception to the rule that forbids punitive damages for breach of contract. The development of punitive damages in California presents an interesting case study. Since the California courts were confined by a statute which prohibited punitive damages for breach of contract, they chose the straightforward method of declaring oppressive breaches to be torts.[53] This feat was accomplished by finding an implied-in-law duty to deal fairly and do nothing to injure the other party. It is interesting to observe that the court discovered this implied-in-law duty by returning to an early contract case and reading the implied-in-law covenant of good faith as an implied-in-law legal duty.[54]

Another way in which courts structure a foundation for punitive damages is by redefining a presently existing tort to make it less restrictive. A popular tort for this approach, quite understandably, is the tort of intentional infliction of emotional distress.[55] A slight variation in this approach was taken by the Su-

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v. Western Nat'l Life Ins. Co., 10 Cal. App. 3d 376, 89 Cal. Rptr. 78 (1970); Kirk v. Safeco Ins. Co. of America, 28 Ohio Misc. 44, 273 N.E.2d 919 (C.P. Franklin County 1970). The courts discussed breaches of contracts generally, rather than confining themselves strictly to insurance contracts. For example, in *Kirk* the court stated:

> Therefore, it is the finding of the court that the actions of the defendant were such as to be a *breach of contract* amounting to a wilful, wanton and malicious tort and fixes punitive damages.

Id. at 46, 273 N.E.2d at 921 (emphasis added).

[53]See California cases in note 52 *supra.*

[54]The court "found" this legal duty in Crisci v. Security Ins. Co., 66 Cal. 2d 425, 426 P.2d 173, 58 Cal. Rptr. 13 (1967), by going back to Comunale v. Traders & Gen. Ins. Co., 50 Cal. 2d 654, 328 P.2d 198 (1958). However, *Comunale* speaks only of an implied contractual duty.

[55]*Compare* Wetzel v. Gulf Oil Corp., 455 F.2d 857 (9th Cir. 1972), *with* Eckenrode v. Life of America Ins. Co., 470 F.2d 1 (7th Cir. 1972). Also, there is an interesting dissent in Boswell v. Hughes, 491 S.W.2d 762 (Tex. Civ. App. 1973), in which Chief Judge Ramsey said:

> In attempting to classify causes of action, the lines of delineation between tort and contract actions may become somewhat obscure, particularly when contractual relief as well as damages for

preme Court of South Carolina when it defined fraud in such vague terms as to include a wide variety of sins, thus, perhaps, allowing punitive damages merely for "dealing unfairly."[56]

A few courts have finally taken the most desirable approach of all, declaring unequivocally that punitive damages are allowable for sufficiently outrageous breaches of contract.[57] This approach has the advantage of avoiding the intricacies of legal fictions required by the other methods. These legal fictions too often lead to miscarriages of justice in individual cases. It appears, however, that courts are more likely to adopt this theory as the culmination of a gradual process rather than as an abrupt reversal. Thus, it is safe to predict that several courts which are presently relying on some form of legal fiction will be able to shed this encumberance as soon as the evolution in thinking has matured. In this respect, the courts are following a time tested method of changing the common law. First they cut several exceptions from the general rule, then they expand these exceptions, until finally it becomes necessary to redefine the general rule in narrower terms.

B. In Indiana

Indiana clearly seems to have established herself at the forefront of this modern trend of allowing punitive damage awards for oppressive breaches of contract with a case recently decided by the First District Indiana Court of Appeals, *Vernon Fire & Casualty Insurance Co. v. Sharp.*[58] Prior to *Vernon,* the law in

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tortious conduct are sought. In an effort to define a tort, it has been stated that the term "tort" has never been accurately defined and from its nature, the term may be incapable of exact definition.

Id. at 764.

[56]Wright v. Public Sav. Ins. Co., 204 S.E.2d 57 (S.C. 1974):

> Fraud assumes so many hues and forms, that courts are compelled to content themselves with comparatively few general rules for its discovery and defeat, and allow the facts and circumstances peculiar to each case to bear heavily upon the conscience and judgment of the court or jury in determining its presence or absence. While it has often been said that fraud cannot be precisely defined, the books contain many definitions, such as *unfair dealing;* the unlawful appropriation of another's property by design.

Id. at 59 (emphasis added).

[57]Adams v. Whitfield, 290 So. 2d 49 (Fla. 1974); Vernon Fire & Cas. Ins. Co. v. Sharp, 316 N.E.2d 381 (Ind. Ct. App. 1974); *see* Isagholian v. Carnegie Institute of Detroit, 51 Mich. App. 220, 214 N.W.2d 864 (1974); Kirk v. Safeco Ins. Co. of America, 28 Ohio Misc. 44, 273 N.E.2d 919 (C.P. Franklin County 1970).

[58]316 N.E.2d 381 (Ind. Ct. App. 1974). In a similar case *Vernon* was cited by the appellate court to support a punitive damage award against an insurance company for its bad faith refusal to pay a claim. Rex Ins.

Indiana with respect to this expansion in punitive damages was uncertain. Perhaps a few recent cases will help put *Vernon* in perspective.

The case of *Jerry Alderman Ford Sales, Inc. v. Bailey*,[59] decided by the Second District Court of Appeals, appeared to be the most progressive. The essential facts were that Bailey purchased a gravel truck from Jerry Alderman Ford which proved to be unsatisfactory, so Bailey returned it for repairs. Jerry Alderman repaired the truck but refused to return it until reimbursed for the cost of repairs. The trial court, however, found that Jerry Alderman's claim was invalid because of an implied warranty of fitness and, after characterizing the defendant's actions as oppressive, the court awarded punitive damages.

The Second District Court of Appeals upheld this award, but it is not clear whether the court of appeals' decision was based upon a finding of a technical tort of conversion, some variation of fraud, or simply an oppressive breach of contract. The court pointed out:

> It may be observed that it is quite possible for a single act to constitute not only actionable fraud, *if such fraud were alleged,* but to constitute as well, evidence of a malicious or fraudulent state of mind on the part of defendant so as to authorize the award to plaintiff of punitive damages pursuant to a complaint for contract rescission and damages . . . or as here, a complaint for damages for conversion or for breach of a contract of bailment.[60]

The court then observed that the allegation of the plaintiff was that the conduct of the defendants was "malicious and oppressive" rather than fraudulent.[61]

Even if this case did not clearly hold that an oppressive breach of contract would be a sufficient foundation for punitive damages, at least it certainly indicated that the court would be receptive to such an approach. It is true that the court never explained exactly what supported the punitive damage award, and it could be argued that the award was based upon some well recognized exception, such as the independent tort of conversion involved. However, the mere fact that the court hesitated to restrict itself may be significant. The opinion certainly did not indicate that an oppressive breach was *not* sufficient. Furthermore, it must be emphasized that in reading the opinion, one is impressed by the fact that no

Co. v. Baldwin, 323 N.E.2d 270 (Ind. Ct. App. 1975). Thus, *Vernon* is not an isolated holding.

[59] 291 N.E.2d 92 (Ind. Ct. App. 1972).

[60] *Id.* at 98 (citation omitted).

[61] *Id.*

matter what legal explanation is offered, punitive damages were obviously awarded by the jury simply because the jurors thought the oppressive conduct involved required a reprimand.

The holding in *Jerry Alderman Ford,* however, seemed to be at odds with the pre-*Vernon* decisions issuing from the First District Court of Appeals. These cases all required that fraud be specifically proved before punitive damages could be allowed in a contract action. However, by approaching these decisions on a case by case basis, the results can be reconciled with *Vernon,* although the language used by the First District Court of Appeals can only be explained by admitting that the court has changed its attitude.

One of the most important cases from the first district is *Standard Land Corp. v. Bogardus.*[62] There was a complicated joint venture in which Standard was to build a golf course and Macke Homes was to build homes for a planned community. Standard flagrantly breached its contract, attempting to force Macke Homes and those who had already purchased homes to buy the golf course. The trial court awarded five thousand dollars punitive damages against Standard because Standard's breach "import[ed] oppression" and indicated a "spirit of wanton disregard for the rights of Macke."[63] However, the appellate court reversed the punitive damages award because there was no specific finding of fraud. The court also noticed the fact that punitive damages were not prayed for but first appeared when the judge awarded them. The opinion of the court clearly indicated that the absence of a finding of fraud was the deciding factor in causing reversal. But one cannot ignore another critical element of this case, which is that Macke Homes can hardly be considered a "little guy." This is not a typical "consumer oppression" case; rather, it is a rough and tumble businessman versus businessman situation in which it is certainly arguable that the court should be slow to punish.

On this basis, that businessmen should be allowed to struggle with each other, *Standard* may remain a sound decision. Certainly there are justifiable policy reasons for arguing that even though a "little guy" may deserve a punitive damage award for an oppressive breach, a businessman needs it only as protection against fraud. This question remains open, but *Vernon* seems to have established that the "little guy" is no longer remedyless against an oppressive breach, even in the absence of a specific finding of fraud.

Another recent case in which the first district court held that fraud was a necessary element for punitive damages at contract

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[62]289 N.E.2d 803 (Ind. Ct. App. 1972).

[63]*Id.* at 820.

was *Physicians Mutual Insurance Co. v. Savage.*[64] However, in *Physicians Mutual,* the trial court had found fraud, so there was no pressure upon the court to reconsider the issue.

With *Vernon,* though, it appears that the first district has closed the gap that previously existed between itself and the Second District Court of Appeals. *Vernon* has a rather confusing factual basis, and unfortunately the brief court opinion does little to clarify it. This is especially lamentable, because without knowing more of the background, it is difficult to decide whether or not the court actually went too far.

Sharp owned a creosoting plant operated by Easter with a total value of approximately $125,000.00.[65] Sharp originally carried full insurance, split equally with four companies, $31,250.00 face value each. But later Sharp cancelled one policy and still later Easter cancelled another policy without Sharp's knowledge. Thus, at the time of the fire, only two policies remained effective, one with Vernon and one with Great American Insurance Company.

In addition to Sharp's claim, Easter lost personal property in the fire that he claimed should have been insured. He, therefore, sued the agent involved and Vernon for negligently failing to insure him.

Since the fire caused over $94,000.00 of damage, more than the full face value of both policies ($62,500.00), Sharp claimed full recovery. The insurance companies, however, refused to settle for two reasons. First, they argued that Easter, if covered at all, was actually covered under these policies, so if they paid Sharp, they might be forced to pay twice. Secondly, they argued that each policy covered only one-fourth of the loss anyway ($23,527.02). During the two year period before the trial, Sharp repeatedly informed the insurance companies how desperately he needed the money, but they refused to discuss a settlement with him, each offering only to pay $23,527.02 if he would make Easter withdraw his suit.

Obviously, a fact situation as complex as this is capable of several interpretations. However, for the present purposes, it will be sufficient merely to point out what the jury must have concluded in order to reach the verdict it rendered. First, the jury must have found, as the plaintiff argued, that Easter's claim had absolutely nothing to do with Sharp's, and that the insurance

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[64]296 N.E.2d 165 (Ind. Ct. App. 1973).

[65]This information obtained from appellate opinion, Vernon Fire & Cas. Ins. Co. v. Sharp, 316 N.E.2d 381 (Ind. Ct. App. 1974); Briefs for Appellant and Appellee, *id.*; and Interview with John T. Lorenz, counsel for Vernon, in Indianapolis, Indiana, Oct. 17, 1974.

company was merely trying to take advantage of its economic leverage to force Sharp to intercede for them.

Secondly, it must have been determined that the insurance companies, possibly through oversight, had failed to write policies covering only one-fourth of the total loss each, as they claimed. Thus, when half of the insurance was cancelled, those companies remaining were indeed liable for the full face amount of each policy in the event that over half the property was destroyed. If this were the case, then the jury easily could have decided that the companies realized their liability but were maliciously going to court, possibly out of spite, or possibly in the hope of making Sharp back down in spite of their contractual obligations to pay him.

These conclusions are supported by the evidence. First of all, part of the language in the insurance contract itself indicates that the coverage was not restricted to one-fourth of the loss:

> This company shall not be liable for a greater proportion of any loss than the amount hereby insured shall bear to the whole insurance covering the property against the peril involved, whether collectible or not.[66]

Secondly, and perhaps most damning of all, the insurance companies failed to introduce one scrap of evidence to support their contention either that Easter's claim interfered with Sharp's, or that the policies covered only one-fourth of the loss. The insurance companies were content to rest their case at the conclusion of the plaintiff's presentation. These facts are certainly not conclusive of the case, but they do lend support to the findings of the jury that the contract was clear on its face, and that the insurance companies breached in bad faith. The appellate court's holding that such findings support punitive damages, and that a finding of fraud is unnecessary, is a commendable step forward.

This case does, however, acquaint us with a disagreeable specter associated with allowing punitive damages for oppressive breaches—the chilling effect involved. It is clear that if this were an honest dispute, as the insurance companies claimed, punitive damages would be undesirable. Punitive damages ought never be available to discourage someone from asserting his rights, even questionable ones, in a court of law.

However, the actor's state of mind here, as in a criminal trial, is a difficult thing to prove, and the jury must be allowed to consider evidence of his conduct in deciding whether or not to award punitive damages. This does not mean that there are no safeguards; nor does it mean that if the jury finds that an insurance company, or some other "big guy," has made an erroneous

[66] 316 N.E.2d at 383.

defense, punitive damages can be tacked on automatically. The trial judge is still in an excellent position to remove this question from the jury, and has a responsibility to do so, if he is convinced that this is a sincere contest. Thus, no one should be fearful of asserting an honest claim in court.

Although a miscarriage of justice admittedly is always possible, so long as proper safeguards are maintained, there is no reason to believe that the jury system will not continue to be a fair method of dispensing justice. To require proof that the defendant's actual thoughts were malicious would be no more possible in a punitive damage case than in a criminal case. Since it is impossible to know what a man is thinking, the jury must be allowed to decide on the basis of external indications. This being the situation, our appellate court adopted the proper method of review when it chose to examine the record in the light most favorable to the plaintiff.[67] This approach still allows the defendant a triple safeguard against unjustified punishment. First, the trial judge will not allow the question to go to the jury unless he can see evidence of bad faith or oppressive conduct. Secondly, the jury must actually find such oppressive action. Finally, the appellate court must determine that as a matter of law the jury could so find. This would seem to allow the defendant sufficient protection and, at the same time, offer the court a workable method of preventing contract oppression.

After several years of uncertainty, the first and second appellate districts of Indiana seem to have agreed that, even in a contract action, Indiana law permits recovery of punitive damages where the conduct of the wrongdoer indicates a heedless disregard of the consequences, malice, gross fraud, or oppressive conduct.[68] The third district has not yet been asked to extend the availability of punitive damage awards to cases involving findings of less than fraud, but there is no reason to believe they will oppose the other districts when the time comes.[69]

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> In examining the factual record to determine whether there is sufficient evidence to warrant the award of punitive damages, it goes without saying that we must and will examine it in the light most favorable to the decision of the trial court. In this context Appellee is entitled to such favorable inferences from all the evidence produced no matter from what source.

Id. at 384.

[68]Rex Ins. Co. v. Baldwin, 323 N.E.2d 270 (Ind. Ct. App. 1975); Vernon Fire & Cas. Co. v. Sharp, 316 N.E.2d 381 (Ind. Ct. App. 1974).

[69]Bob Anderson Pontiac, Inc. v. Davidson, 293 N.E.2d 232 (Ind. Ct. App. 1973).

V. Factors Influencing the Expansion of Punitive Damages

There can no longer be any doubt that the availability of punitive damages is increasing; the question now is where to draw the line. Behind the scenes, several forces are having justifiable influence on the courts.

First, courts are exhibiting a growing intolerance for "contractual oppression," which they often refer to as "consumer fraud,"[70] although the label is not quite broad enough. While it is true that such oppression usually involves consumers, the touchstone is really the economic oppression involved. It just happens that this oppression usually occurs in the consumer context. Fraud, too, seems not quite accurate. Oppression is the actual key, and justifiably so. Does it make any difference whether the man never intended to do as he promised, or whether he realized after the contract was signed that he could extort more from the other party? One is fraud, the other is merely an oppressive breach; but can anyone argue that the end result is any different, or that one action is less demanding of deterrence than the other? Courts are recognizing that entering a contract often makes one party dependent on the other—creating a type of fiduciary relationship.[71]

Perhaps the courts are compensating for our changing economic structure. People no longer deal with the village blacksmith and the town grocer. Now the public deals with General Motors and A & P. The individual consumer no longer has the bargaining strength that competition provided when the parties dealt on a one to one basis, so he is more vulnerable. When the courts attempt to increase the consumer's muscle, they are using punitive damages for the same reasons they have always used them—to prevent oppressive behavior "actuated by ill will, malice, or evil motive."[72] The difference is merely that a changing society has created new opportunities for oppressive behavior, so the courts have developed new ways to control it.

However, there are some valid reasons for applying restraints to this expansion. Perhaps most importantly, the courts must be careful not to discourage honest litigation by allowing punitive damages against someone who is merely exercising his right to adjudicate an honest dispute—even if he is found to be in error and, indeed, even if this litigation injures the other party.[73] The

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[70]Capitol Dodge v. Haley, 288 N.E.2d 766 (Ind. Ct. App. 1972); Walker v. Sheldon, 10 N.Y.2d 401, 179 N.E.2d 497, 223 N.Y.S.2d 488 (1961).

[71]*See* Fletcher v. Western Nat'l Life Ins. Co., 10 Cal. App. 3d 376, 89 Cal. Rptr. 78 (1970).

[72]McCormick § 79, at 280. See note 5 *supra*.

[73]See text accompanying notes 66 & 67 *supra*.

cases indicate, however, that courts are very much aware of this problem and are protecting the right to adjudicate honest disputes.[74]

Another reason for restraint was mentioned earlier.[75] Our economic system seems to operate best when a certain amount of friction is allowed to exist between people with roughly equal bargaining power. The judiciary is not justified in interfering with the business world to the extent of punitive damages merely to prevent the normal jockeying that occurs. It is only as a last resort, when someone is "picking on a little guy" who lacks the power to protect himself in the ordinary ways (typically a consumer), that the court is justified in awarding punitive damages to deter similar oppression in the future.

Probably one of the most neglected problems is that of exercising appropriate control over the size of the punitive award.[76] It seems that most courts merely ignore this problem so long as punitive damage awards remain uncommon, but as soon as an individual court begins to encounter such awards more frequently and to realize that it must deal with the problem, a solution is seldom troublesome. Several courts have already established a workable procedure.[77] One of the most effective solutions is to allow the trial judge to order remittitur if he feels the award is excessive.

It has been suggested that allowing punitive damages in a contract action would create too much uncertainty in litigation. But so long as the courts continue to be guided by the considerations discussed in the last few paragraphs, uncertainty should not be a serious problem. Further, courts have always been willing to allow punitive damages for certain contract breaches, and these exceptions have not proved overly troublesome. The present development merely adds another type of breach to the existing list of exceptions.

VI. Conclusion

Although courts have always allowed punitive damages for certain contract breaches, there currently seems to be an expansion under way. The requirement appears to be drifting from breach plus fraud to breach plus oppression.

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[74]Crenshaw v. Great Cent. Ins. Co., 482 F.2d 1255 (8th Cir. 1973); Cassady v. United Ins. Co. of America, 370 F. Supp. 388 (W.D. Ark. 1974); McNutt v. State Farm Mut. Auto. Ins. Co., 369 F. Supp. 381 (W.D. Ky. 1973).

[75]See text accompanying notes 63 & 64 *supra*.

[76]McCormick § 85, at 296; Prosser § 2, at 14.

[77]Addair v. Hoffman, 195 S.E.2d 739 (W.Va. 1973); Prosser § 2, at 14.

As with any evolution of this type, the fringes are frayed and uncertain.[78] Several states have adopted differing requirements,[79] while some states have refused to allow any expansion at all.[80] Many opinions carefully avoid explaining their positions, holding simply that in the particular breach of contract before the court, punitive damages are justified. Then, if a case arises in which punitive damages are really not justified, the court reverts to the tired phrase that "this is an action in contract, therefore punitive damages are not available."[81]

This indecisive approach obviously provides little in the way of direction for future disputes, and it would be helpful for the courts to establish better guidelines. But, as with most changes in the common law, this is an evolutionary process, and it simply remains for time and the sediment of case law to eventually establish the boundaries for this new "island" of law.

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[78] *Accord,* Glenn v. Esco Corp., 520 P.2d 443 (Ore. 1974).

[79] California has emphasized unconscionable acts and bad faith. Gruenberg v. Aetna Ins. Co., 9 Cal. 3d 566, 510 P.2d 1032, 108 Cal. Rptr. 480 (1973). A Florida court said in dictum that legal malice is sufficient for punitive damages in a breach of contract action. Adams v. Whitfield, 290 So. 2d 49 (Fla. 1974). Oregon has expressed a willingness to allow punitive damages for an act that violates " 'social interests' of importance." Glenn v. Esco Corp., 520 P.2d 443, 445 (Ore. 1974). South Carolina has attacked the problem by declaring that fraud includes "unfair dealing." Wright v. Public Sav. Ins. Co., 204 S.E.2d 57 (S.C. 1974).

[80] Waters v. Trenckmann, 503 P.2d 1187 (Wyo. 1972).

[81] Vanston v. Connecticut Gen. Life Ins. Co., 482 F.2d 337 (5th Cir. 1973); Henry Morrison Flagler Museum v. Lee, 268 So. 2d 434 (Fla. 1972); Eskew v. Camp, 204 S.E.2d 465 (Ga. Ct. App. 1974).

Possession of Dangerous Drugs in Indiana

I. Introduction

The Indiana legislature, like the legislatures in other states, makes "possession" of certain types of drugs criminal.[1] The Indiana statute gives little description of the offense beyond the single word "possession." This lack of legislative guidance has predictably led to some confusion regarding the nature of the offense. This Note attempts to reveal the present nature of the Indiana drug possession law and to suggest what that law may and should become.

The body of the Note is divided into four parts. The first section examines the teachings of the Indiana appellate and supreme courts concerning the elements of the crime. The analysis in the first part will be restricted to the language used by the courts in describing the offense to determine, to the extent possible from language alone, the State's drug possession case. In this vein, the emphasis will be on the courts' own words in defining the nature of the crime. The second division examines what those same courts have accepted as sufficient evidence to support a jury's finding of the required elements. This analysis suggests the hypothesis that, in at lease some reported decisions, the Indiana courts have been willing to accept convictions based on evidence arguably inadequate to prove the elements the courts have said they require. The focus of this hypothesis is upon the concept of "constructive possession" and the potential for abusive disregard of the requisite elements of the offense inherent in this concept if allowed application without restraint. In the third section of the Note, analysis shifts to case law from other jurisdictions, examining how other states have handled the law of drug possession. This segment will suggest a solution to the problem discussed in the second topic and discuss the ramifications on Indiana law of this suggested remedy. The final subdivision of the Note presents what may happen if the proposed solution is

[1] Ind. Code § 35-24.1-4-1(c) (Ind. Ann. Stat. § 10-3561, Burns Supp. 1974) provides: "It is unlawful for any person knowingly or intentionally to possess a controlled substance . . ." without proper legal authority. The same section provides for penalties for such possession. "Controlled substances" include, among other things, chemical synthetics such as amphetamines, all forms of cannabis, and opium derivates. *See id.* § 35-24.1-1-1(e) (Ind. Ann. Stat. § 10-3558(e)).

A crime obviously directed at drug sales and therefore distinct from the mere possession of dangerous drugs is possession "with intent to manufacture or deliver." *See id.* § 35-24.1-4-1(a), (b) (Ind. Ann. Stat. § 10-3561(a), (b)).

not employed, thus arguing why it should be accepted as the better approach to the law of possession of prohibited drugs in Indiana.

II. The Elements of the Offense

The first aspect of the State's case in a prosecution for possession of prohibited drugs is, obviously, to demonstrate that the substance which the accused "possessed" is, in fact, a prohibited drug.[2] Beyond this simple point the question of elements becomes more complicated. Traditional analysis of the elements of a crime mandates a two-fold inquiry into the actus reus, or forbidden act, and the mens rea, or forbidden mental state accompanying that act. While it is not entirely clear from the wording of the statute that the act and the intent are distinct elements in the Indiana offense of drug possession, the discussion will proceed as if the traditional analysis is applicable.

What act or acts constitute "possession" within the meaning of the statute is not completely certain, but it is generally held that a conviction for possession of a dangerous drug may rest upon either actual or constructive possession.[3] "[A]ctual possession means exactly what it implies, *i.e.* actual physical control."[4] Constructive possession is the actus reus which is the source of confusion.

In 1969, the Indiana Supreme Court, in *Williams v. State*,[5] went to great lengths in attempting to define constructive possession and to distinguish it from actual possession. Justice Hunter, speaking for the court, wrote that "the element of custody and control is involved" in both types of possession.[6] The difference between the two types of possession is whether "the ability to control the thing possessed" is a "present ability" (actual possession) or a "past ability" (constructive possession).[7] Since Justice

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[2]The complete list of proscribed drugs is found at *id.* § 35-24.1-1-1(e) (Ind. Ann. Stat. § 10-3558(e)). It is not within the scope of this Note to examine problems of forensic proof as to what is or is not a barbituate or the like; mention is made of this point only to alert the reader to this element.

[3]Rose v. State, 281 N.E.2d 486 (Ind. 1972).

[4]Corrao v. State, 290 N.E.2d 484, 487 (Ind. Ct. App. 1972), *citing* Williams v. State, 253 Ind. 316, 321, 253 N.E.2d 242, 245 (1969).

[5]253 Ind. 316, 253 N.E.2d 242 (1969).

[6]*Id.* at 321, 253 N.E.2d at 245. As to what he meant by "control and custody," Justice Hunter said:

> Ordinarily "control" means . . . power or authority to check or restrain; regulating power; restraining or directing influence . . . *so too it may imply, or not imply possession depending on the circumstances.*

Id. at 322, 253 N.E.2d at 246 (emphasis in original).

[7]*Id.* at 321, 253 N.E.2d at 245.

Hunter had already stated in his opinion that actual possession entailed actual "physical control,"[8] it is apparent that for actual possession the accused must be in the process of exercising the ability to control, check, or restrain[9] the substance when he is discovered. The use of the adjective "past" to modify "ability to control" in the definition of constructive possession suggests that the accused need not be presently exercising his power to check or restrain the object—it is enough that he could have done so at one time.

The Indiana Supreme Court dealt with the constructive possession problem again in *Thomas v. State*.[10] The court's opinion did not refer to its decision in *Williams* and cited two arguably different definitions of the constructive possession concept. In its own words, the court held that a conviction on a theory of constructive possession required a showing that the defendant had a "capability to maintain control and dominion over" the thing possessed.[11] That the accused did in fact once exercise that ability does not appear to be crucial in either the *Williams* or *Thomas* definition. The fact that he had the power to exercise control at the time of his arrest is made conclusive of his past or present exercise of control. In this sense, the forbidden act need not be an affirmative act at all—the failure of the accused to take positive action to terminate his "ability to control" the drug is sufficient.

The *Thomas* court, in addition to formulating its own definition of constructive possession, cited with approval and deemed "applicable" to Indiana law the following statements of the Colorado Supreme Court:

> A conviction of illegal possession may be based upon evidence that the marijuana, while not found on the person of the defendant, was in a place under his dominion and control. . . . Possession need not be exclusive and the substance can be possessed jointly by a person and another without a showing that the person had actual physical control thereof.[12]

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[8] *Id.*

[9] See note 6 *supra*.

[10] 291 N.E.2d 557 (Ind. 1973).

[11] *Id.* at 558. The wording of this definition can be reconciled with that used in *Williams* by reasoning as follows. "Capability" is synonymous with "ability;" "maintain" suggests a "past" ability, yet is less ambiguous since there can be little doubt under the *Thomas* definition that the accused must retain his power to control the object at the time of his arrest whereas the *Williams* wording might be read to mean that the accused need not be able to control the thing when arrested. See note 6 *supra*.

[12] Feltes v. People, 178 Colo. 409, 411, 498 P.2d 1128, 1131 (1972), *as quoted in* Thomas v. State, 291 N.E.2d 557, 559 (Ind. 1973).

The Colorado court's remarks broaden the scope of potential application of the constructive possession concept well beyond what the Indiana court's own words imply. Not only is evidence of the ability to exercise control taken as proof that the accused once exercised that ability, but evidence that the substance is in a place over which the accused has power and authority is proof of that ability. Moreover, the accused need not be the only person with power over the premises for the required ability to control the substance discovered therein to be found. Since the actual exercise of control over the premises appears no more necessary than actual exercise of control over the drugs, it seems that a person may be in danger of prosecution under the Indiana statute[13] for failing to inspect thoroughly the premises if drugs are later discovered there by a more thoroughly searching police officer.

Such a danger appears fanciful in light of the fact that both of the Indiana Supreme Court's definitions of constructive possession are qualified to the extent that the defendant must be shown to have had some "intent" to possess the drugs.[14] While intent to possess may be the judicial definition of the mens rea for this offense, intent is clearly not the crucial question since "intent to commit the crime charged may be inferred from the voluntary commission of the act."[15] The critical issue regarding the accused's mental state is his knowledge—he must "have actual knowledge of the presence of the item."[16] It is not entirely clear whether the

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[13]See note 1 *supra*.

[14]The *Williams* court spoke of the necessity of showing "an intent to exclude others from such control." Williams v. State, 253 Ind. 316, 321, 253 N.E.2d 242, 245 (1969). The *Thomas* court thought that "an intent . . . to maintain control and dominion" was necessary. Thomas v. State, 291 N.E.2d 557, 558 (Ind. 1973). The use of the words "exclude others" by the *Williams* court suggests that the possession must be exclusive, but this clearly is not the case today in light of the *Thomas* court's adoption of the Colorado concept of joint constructive possession and the *Williams* court's failure to use "all" to precede and explain who the "others" are.

[15]Wojcik v. State, 246 Ind. 257, 260, 204 N.E.2d 866, 867 (1965). While *Wojcik* is not a drug possession case, this rule has been explicitly applied to Indiana drug possession cases. *See* Thomas v. State, 291 N.E.2d 557 (Ind. 1973)); Corrao v. State, 290 N.E.2d 484 (Ind. Ct. App. 1972).

[16]Corrao v. State, 290 N.E.2d 484, 487 (Ind. Ct. App. 1972), *citing* Malich v. State, 201 Ind. 587, 588, 169 N.E. 531, 532 (1930). *Malich* is a Prohibition case, not a dangerous drugs case, but the rule stated was applied to the possession of dangerous drugs in Corrao v. State, 290 N.E.2d 484, 487 (Ind. Ct. App. 1972). The Indiana Supreme Court has, and the appellate courts have, applied to dangerous drug cases precedent from cases concerning illegal alcohol. *See* Ledcke v. State, 296 N.E.2d 412 (Ind. 1973). Explicit references to the requirement of knowledge in drug possession cases in the court's own words can be found in Von Hauger v. State, 254 Ind. 297, 298, 258 N.E.2d 847, 850 (1970); Greely v. State, 301 N.E.2d 850, 852 (Ind. Ct. App. 1973).

knowledge required is a function of the actus reus or a distinct mens rea, considering that the failure to act affirmatively to eliminate the circumstance whereby the drugs are in a place over which one has dominion and control is a sufficient actus reus for constructive possession.

The failure to act can hardly be said to be voluntary, and thus an act from which the required intent[17] could be inferred,[18] unless the actor has a choice of whether or not to act. A choice of whether or not to take action to eliminate a particular circumstance necessarily requires knowledge of the existence of that circumstance.[19] Judge Lowdermilk, in *Greely v. State*,[20] seemed to share this view of the interrelationship of "intent," "voluntariness," "choice," and "knowledge" by stating that it is "obvious that to have constructive possession one must have some knowledge that the material is present."[21] However, the Indiana Supreme Court, in holding that once "possession is established, knowledge of the character of the drug and the fact that it is possessed can be inferred therefrom,"[22] suggests that knowledge is a distinct mental state that follows and flows from proof of a distinct act of "possession." If it is the case that "knowledge" is separable from "possession," an element inferrable from evidence of the "ability to control" the drugs, then a showing that the drugs were found in a place that the accused could have controlled is, without more, sufficient to establish his culpability. If, on the other hand, knowledge is a prerequisite to constructive possession, it would seem that proof of "knowledge," beyond proof of the fact of the accused's ability to control the place in which the contraband is found, would be necessary to convict him of possession of illegal drugs. The apparent conflict can only be resolved by examining the facts in the cases.

Before proceeding to the question of proof of the elements to discover how knowledge interplays with possession, the question of the *extent* of the knowledge required must be resolved. While the Indiana Supreme Court has never explicitly so held, it seems apparent that knowledge that the substance "possessed" is in fact a prohibited drug is as much an essential element of the offense

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[17]Thomas v. State, 291 N.E.2d 557 (Ind. 1973); Williams v. State, 253 Ind. 316, 253 N.E.2d 242 (1969).

[18]Wojcik v. State, 246 Ind. 257, 260, 204 N.E.2d 866, 867 (1965).

[19]The same logic was used by the United States Supreme Court in a different context in Lambert v. California, 355 U.S. 225 (1957).

[20]301 N.E.2d 850 (Ind. Ct. App. 1973).

[21]*Id.* at 852.

[22]Feltes v. People, 178 Colo. 409, 411, 498 P.2d 1128, 1130 (1972), *as quoted in* Thomas v. State, 291 N.E.2d 557, 559 (Ind. 1973); *accord*, Phillips v. State, 313 N.E.2d 101 (Ind. Ct. App. 1974).

as knowledge of the presence of the substance.[23] Indeed, these two aspects of knowledge have always been treated as inseparable in Indiana.[24] However, as in the instance of "knowledge of the presence of the item," it is unclear whether knowledge of the illegal character of the item is a distinct means rea inferrable solely from proof of the actus reus of possession or whether such knowledge is a prerequisite of that "possession."[25]

III. Proof of the Elements of the Offense

In Indiana in recent years, only three convictions for unlawful possession of drugs have been overturned because of insufficient evidence.[26] Most convictions rested upon a theory of actual possession, and none of these were reversed for insufficient evidence.[27] In none of the actual possession cases was the question of the appellant's knowledge discussed in the reported opinion.[28] This

[23]The courts' statements in Malich v. State, 201 Ind. 587, 588, 169 N.E. 531, 532 (1930), *as quoted in* Corrao v. State, 290 N.E.2d 484, 485 (Ind. Ct. App. 1972) (referring to "knowledge" of the "presence" of the "item"), and in Greely v. State, 301 N.E.2d 850, 852 (Ind. Ct. App. 1973) (referring to "knowledge" of the "presence" of the "material"), probably sought to lay down rules of general applicability, useful in any possession of contraband case, rather than to exclude a requirement of knowledge of forbidden character. This is especially clear in light of the supreme court's quotation in *Thomas* from Feltes v. People, 178 Colo. 409, 411, 498 P.2d 1128, 1130 (1972), that knowledge of the character of the drug can be inferred from proof of possession. 291 N.E.2d at 558. Language similar to that of the Colorado court in *Feltes* was used by the Indiana Court of Appeals in Phillips v. State, 313 N.E.2d 101 (Ind. Ct. App. 1974), as to how knowledge of the character of the drug could be shown, again suggesting that such knowledge is essential.

[24]*See* Thomas v. State, 291 N.E.2d 557 (Ind. 1973); Phillips v. State, 313 N.E.2d 101 (Ind. Ct. App. 1974).

[25]Logic dictates that a person could not voluntarily possess, and therefore could not intend to possess, a *narcotic* unless the thing over which he has the ability to control is known to him to be a narcotic. See note 19 *supra*.

[26]*See* Greely v. State, 301 N.E.2d 850 (Ind. Ct. App. 1973); Corrao v. State, 290 N.E.2d 484 (Ind. Ct. App. 1972). Several convictions for illegal drug possession have been overturned in recent years on grounds other than insufficient evidence. *See, e.g.*, Ludlow v. State, 314 N.E.2d 750 (Ind. 1974) (conviction overturned on fourth amendment grounds), but since this Note deals with the definition of the offense of "possession" itself, such cases are not germane to the inquiry and hence are not discussed.

[27]*See* McGowan v. State, 296 N.E.2d 667 (Ind. 1973); Rose v. State, 281 N.E.2d 486 (Ind. 1972); Patterson v. State, 255 Ind. 22, 262 N.E.2d 520 (1970); Spright v. State, 254 Ind. 420, 260 N.E.2d 770 (1970); Cartwright v. State, 289 N.E.2d 763 (Ind. Ct. App. 1972).

[28]The absence of such discussion makes it unclear whether or not any of the defendants in these actual possession cases focused on the knowledge element in their general positions that the trial court judgments were supported by insufficient evidence. Lack of urging by counsel on this partic-

fact suggests that the reviewing courts have had no difficulty in accepting the fact-finder's inference of guilty knowledge, not only when the accused was seen holding the drugs openly in his hands,[29] but also when he was seen "throwing away"[30] or "dropping"[31] packets subsequently found to contain drugs. The inference of knowledge is apparently permissible in such cases regardless of whether or not the conduct of the accused or other evidence independent of his physical control of the drugs suggests guilty knowledge.[32] The practical effect of permitting an inference of knowledge from physical control to be sufficient proof of that knowledge without independent support is to create a presumption that an accused is aware of the presence and character of all items on his person.[33] While such a presumption may be reasonable in most

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ular element in these cases may account for the lack of discussion by the courts. In any event, since discussion of the elements of the offense in the first subdivision of this Note revealed that the courts do consider knowledge an element of the State's case—though, as the first section suggested, the actual nature of the knowledge element is unclear—a general claim of insufficient evidence to support a belief beyond reasonable doubt of the existence of *all elements* would necessarily embrace the proposition that there is insufficient evidence of the particular element of guilty knowledge.

[29]Rose v. State, 281 N.E.2d 486 (Ind. 1972).

[30]Patterson v. State, 255 Ind. 22, 262 N.E.2d 520 (1970); Cartwright v. State, 289 N.E.2d 763 (Ind. Ct. App. 1972).

[31]McGowan v. State, 296 N.E.2d 667 (Ind. Ct. App. 1973); Spright v. State, 254 Ind. 420, 260 N.E.2d 770 (1970).

[32]While in Rose v. State, 281 N.E.2d 486 (Ind. 1972); Patterson v. State, 255 Ind. 22, 262 N.E.2d 520 (1970); and Cartwright v. State, 289 N.E.2d 763 (Ind. Ct. App. 1972), the various defendants either fled from police, took overt actions to hide or "throw away" the drugs, or had criminal records with several prior drug convictions, neither the defendant in McGowan v. State, 296 N.E.2d 667 (Ind. 1973), nor the accused in Spright v. State, 254 Ind. 420, 260 N.E.2d 770 (1970) (the defendants "dropped" the covered packets containing drugs), acted in a manner consistent with an inference of guilty knowledge nor were stopped for suspicion of drug possession nor had records of prior drug convictions. Apparently the suspicious conduct of the accused is not necessary to support an inference of guilty knowledge.

[33]It is not clear if this presumption is rebuttable and, if so, by what type of evidence. See note 28 *supra* as to the absence of discussion of knowledge in the actual possession cases. It is suggested that if the accused in McGowan v. State, 296 N.E.2d 667 (Ind. 1973), had been able to show that the coat he was wearing, from the pocket of which the packet of drugs "dropped," was not his own but was borrowed immediately prior to his arrest, the inference of knowledge should not have been supportable without additional facts, such as flight, to buttress the inference. However, no such argument was either pressed or given judicial recognition by the reviewing courts in McGowan v. State, *supra*, or Spright v. State, 254 Ind. 420, 260 N.E.2d 770 (1970).

cases when limited to the defendant's person, it seems questionable if applied to "a *place* under his dominion and control."[34]

The courts have stated that, to support a conviction for constructive possession, the place in which the drugs are found must be shown to be a place over which the accused has an ability of control.[35] Unless the evidence offered to show this required "ability to control" is scrutinized closely to assure a real link between the accused and the drugs, logic suggests that "constructive possession" could become a vehicle for the conviction and punishment of innocents whose "crime" is merely being in the wrong place at the wrong time. A survey of recent constructive possession cases intimates that such a scrutiny is not always the rule.

Legal authority to control the premises upon which the drugs are found has, in nearly all the constructive possession cases, been deemed a sufficient basis upon which to rest a finding of a real or practical ability to control the place. Thus, the registered owner of a car has been held to be in control of drugs found in the trunk,[36] in the ashtrays,[37] and on the floor;[38] the tenant of an apartment was found in control of drugs discovered therein;[39] the renter of a house was viewed as being in control of drugs in an upstairs bedroom of the house, although the bedroom was not shown to be his.[40] Indeed, legal ownership in at least one case proved to be the dividing line between acquittal for the car's passengers and conviction for its owner.[41]

Legal authority to control the premises, while given great weight, has not been deemed conclusive proof of actual ability to control in at least one case, *Greely v. State*.[42] In *Greely*, a homeowner was not assumed to have a practical ability to control drugs found in his backyard, far from the house itself where he was arrested. In terms of the actus reus of the crime of constructive possession, the result in *Greely* may be reconciled with the results in other cases in which the accused has legal authority over the premises only if the interrelated factors of proximity and access

[34]Feltes v. People, 178 Colo. 409, 411, 498 P.2d 1128, 1130 (1972), *as quoted in* Thomas v. State, 291 N.E.2d 557, 559 (Ind. 1973) (emphasis added).

[35]*Id.* See text accompanying notes 10-12 *supra*.

[36]Corrao v. State, 290 N.E.2d 484 (Ind. Ct. App. 1972).

[37]Weingart v. State, 301 N.E.2d 222 (Ind. Ct. App. 1973).

[38]*Id.*

[39]Thomas v. State, 291 N.E.2d 557 (Ind. 1973).

[40]Ludlow v. State, 302 N.E.2d 838 (Ind. Ct. App. 1973), *rev'd on other grounds*, 314 N.E.2d 750 (Ind. 1974).

[41]Corrao v. State, 290 N.E.2d 484 (Ind. Ct. App. 1972).

[42]301 N.E.2d 850 (Ind. Ct. App. 1973). As subsequent discussion of this case will show, the reason that the constructive possession conviction was reversed was that the inference of guilty knowledge from control of the premises was not alone sufficient to prove the required knowledge.

to the drug are introduced. In the cases in which the property "owner's" conviction was upheld, not only were the drugs found in or on property which the accused had authority to control, but the drugs were close enough to the defendant so as to be readily accessible to him. The same proximity and accessibility were arguably not present in *Greely*. The term "access" is not meant to imply that the accused must be the only person with access to the place in which the drugs are found, for this is clearly not the case in light of the Indiana Supreme Court's acceptance of the concept of "joint" constructive possession.[43]

Greely cannot be reconciled with the other "ownership" constructive cases solely on the grounds of access and proximity in light of the decision in *Corrao v. State*.[44] In *Corrao*, the court overturned the convictions of two passengers of the car but not the convictions of the owner and the driver for constructive possession of marijuana found in the trunk of the car. The Indiana Court of Appeals felt that the passengers had no access to the car's trunk sufficient to amount to control of its contents, despite their proximity to the trunk. The owner, having the legal authority to control the car's contents, was easily found to have a practical ability to control the trunk's contents. The *Corrao* court found similar control by the driver, apparently on the theory that, having the car keys, he could have entered the trunk of the car.[45]

[43]Thomas v. State, 291 N.E.2d 557 (Ind. 1973). The Indiana Supreme Court quoted from Feltes v. People, 178 Colo. 409, 498 P.2d 1128 (1972), and the court in Corrao v. State, 290 N.E.2d 484 (Ind. Ct. App. 1972), cited the same language from *Feltes*.

[44]290 N.E.2d 484 (Ind. Ct. App. 1972).

[45]*Id.* at 488. The court stated that the driver could be deemed in control of the contents of the automobile trunk by virtue of his practical control of the car. His access to the trunk apparently rested on his physical control, at the time of the arrest, of the keys to the car. The passengers, in light of the court's characterization of them as friends or acquaintances of the driver and the owner, obviously had ready access to the car's trunk by virtue of their proximity thereto and the fact that the driver would probably have opened the trunk for them. The difference, then, between the driver and the passengers, is that the former presumably was in a position to get into the trunk immediately without going through any other party whereas the latter could not have entered the trunk without assistance from the driver or the car owner. However, if this is the distinction, it makes little sense to convict the driver along with the owner since the latter's acquiescence in the former's *driving* of the car hardly compels the notion of the owner's acquiescence to the driver's complete control of all the contents of the car. Few would suggest that the driver could or would go into the car's trunk over the owner's objection. Thus the driver is in the same position as the passengers relative to the contents of the trunk—like the passengers, practically he must first go through another person to enter the trunk of the car.

The conviction of the driver in *Corrao* illustrates the point that practical ability to control may be found to exist without legal authority, if the defendant is in such a position as to have ready access to the place where the drugs are found. Ready access, of course, is easily translated into proximity. When the accused has sole access to the place where the drugs are found, as in *Phillips v. State,*[46] the conclusion that evidence of proximity equals proof of accessibility amounting to an ability to control may well be defensible. But when the accused is only one of many with access to the place where the drugs are found, the technique of transforming proximity to the drugs into the crime of "possession" of those drugs seems dangerous indeed. Thus, in 1970, when the Indiana Supreme Court, in *Von Hauger v. State,*[47] affirmed the conviction of a non-owner driver, who was one of two occupants of the car, for possession of drugs found under the seat, there was a vigorous dissent.

In a subsequent case, *Ledcke v. State,*[48] the supreme court affirmed the conviction for possession of marijuana of a visitor to an apartment occupied by several persons; the marijuana was not even in the same room as the defendant. The majority in *Ledcke* stated that mere proximity to illegal drugs is not sufficient proof of the ability to control the drugs necessary to conviction but avoided the result that such a statement might compel by analogizing the apartment to a "manufacturing-type setting."[49]

The driver thus has even less claim to the car's trunk than the homeowner to his backyard in *Greely*, but the former was convicted and the latter was not. Accessibility, therefore, cannot be the sole distinction to reconcile the cases.

[46]313 N.E.2d 101 (Ind. Ct. App. 1974). For a discussion of the facts in *Phillips* that demonstrated the appellant's *sole* access to the place where the drugs were found so that he possessed the exclusive ability to control the drugs, see note 59 *infra.*

[47]254 Ind. 297, 299, 258 N.E.2d 847, 848 (1970) (Jackson, J., dissenting).

[48]296 N.E.2d 412, 421 (Ind. 1973) (DeBruler, J., dissenting).

[49]*Id.* at 416. The phrase "manufacturing-type setting" was lifted from bootlegger cases wherein the theory had developed that a person found near a bootlegger's illegal still was presumed to be a part of the unlawful enterprise. *See* United States v. Gainey, 380 U.S. 63 (1965). The majority in *Ledcke* was careful to limit its holdings to cases in which the scene of the arrest could be characterized as a "manufacturing-type setting." 296 N.E.2d at 418. The evidence upon which the majority relied in its characterization consisted primarily of evidence that (1) the entire apartment was permeated with "very heavy smoke" identified by the officers as burning marijuana, (2) that two skillets of marijuana were being "cured" by being heated in the oven, and (3) that several bags full of cured and uncured marijuana were found in various places around the apartment.

The use of alcoholic beverage cases as precedent for drug cases was also made by the court of appeals in Corrao v. State, 290 N.E.2d 484 (Ind. Ct. App. 1972). See note 16 *supra.*

That characterization of the scene was objected to by the lone dissenter, who seemed to feel that the court was doing exactly what it said it could not do, namely, equating proximity and possession.[50]

The Court of Appeals of the Third District, in affirming the conviction in *Smith v. State*,[51] did not feel compelled to discuss whether or not the motel room where the accused was apprehended approximated a "manufacturing-type setting." In *Smith*, a packet of heroin was found in a pocket of Roller's coat, which was hanging in a closet of a room registered in Roller's name. The defendant was one of four people, including Roller, found in the room by police. Of crucial importance to the court was evidence that the defendant had injected himself with heroin sometime before the arrest. This was deemed to be "circumstantial evidence tending to show he was in possession of the drug prior to taking it."[52]

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[50]Justice DeBruler noted that the majority had stated that "merely being or having been present in a place where marijuana is found is not sufficient proof that such person is in possession where he is not in exclusive possession of the place." 296 N.E.2d at 421-22. But he objected to the majority's analogy to United States v. Gainey, 380 U.S. 63 (1965), arguing that the

> underlying notions of the nature of a place of manufacture do not adhere to this apartment. . . . This was a home where all the homelike activities of human beings take place. . . . No natural presumption arises that all present in such a place of residence are steadfastly engaged in the same activity, no matter how "obvious" such an activity might be.

296 N.E.2d at 422. Thus in light of the fact that the defendant could have been present in the apartment for any number of reasons other than the participation in the "manufacture" of illegal drugs, the value of the presumption of involvement falls away. If the "manufacturing-type setting" can be drawn so easily without regard to the theoretical underpinnings which limit it to cases in which no activity other than the unlawful manufacture is reasonably possible on the premises, then proximity may indeed be "possession" regardless of whether or not the accused is in "exclusive" possession.

[51]316 N.E.2d 841 (Ind. Ct. App. 1974).

[52]*Id.* at 842. The *Smith* court cited two Maryland appellate court cases as authority for the proposition stated in the text. Maryland, however, follows the rule that knowledge is not an element of the offense of drug possession. *See* Jenkins v. State, 215 Md. 70, 137 A.2d 115 (1957). The Maryland rule is contrary to the Indiana view. *See* Thomas v. State, 291 N.E.2d 557 (Ind. 1973).

Though the court did not so state, its reliance on use to show "constructive possession" seems to revive the early definition of the constructive possession doctrine as a "past ability to control." Williams v. State, 253 Ind. 316, 321, 253 N.E.2d 242, 245 (1969). If a *past* ability to control is alone sufficient, then even a defendant's termination of his ability to control the drug by destroying it would not exculpate him from "constructive" possession. If this is true, Smith could have been convicted of possession

Considering the cases discussed in the preceding paragraphs, it is clear that an individual commits the act of "possession" of an unlawful drug by such diverse conduct as holding the drug in his hands, being under the influence of the drug, owning or renting a house in which drugs are found, and merely being so close to the place where the drugs are that he is capable of being viewed as having access to those drugs.

In the traditional common law view of criminal justice, the mens rea requirement precluded conviction of a person who innocently or inadvertently committed the actus reus of a given offense.[53] As any experienced trial lawyer will attest, proof of the mens rea element is very often supplied by inference from the voluntary commission of an overt act.[54] If the act is by its very nature unequivocal, as would be the firing of a loaded pistol at another's head, our common sense tells us that there is slight danger of convicting an innocent person by supplying the necessary intent from inference from that act. But if, as in the case of constructive possession, the "act" may be as equivocal as being in one place deemed too close to another place, the danger of permitting the inference of guilty knowledge from the commission of the act is obvious. This danger becomes clearer when one considers that the forbidden act may amount to a failure to act affirmatively to eliminate one's proximity, and thus accessibility, to a place where drugs are found. Moreover, a failure to act to remove oneself from the place where drugs may be is hardly voluntary if the actor does not know the drugs are there. Logic thus commands that when the actus reus is really an omission, a strong showing of guilty knowledge should be made, independent of the

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of the heroin, which the court speculated that he flushed down the toilet when the police arrived, on the basis of his prior use of some of that heroin.

If past ability to control a now non-existent drug equals constructive possession, how long ago in the "past" may that once-held ability be? Would the State be able to prove a case of constructive possession simply by producing witnesses to testify that they once saw the accused injecting himself with or holding drugs? In any event, it is unclear whether use may thus be possession even when the drug is gone, because Smith was convicted of possession of the package of heroin found in Roller's coat pocket in the closet. The court speculated that the particular heroin in the coat pocket was more of the same that Smith had possessed "prior to taking it."

[53]"An unwarrantable act without a vicious will is no crime at all." 2 W. BLACKSTONE, COMMENTARIES *21.

[54]The Indiana Supreme Court acknowledged the practice, which is of course usually a product of necessity, in saying that "intent may be inferred from the voluntary commission of the act." Wojcik v. State, 246 Ind. 257, 259, 204 N.E.2d 866, 867 (1965). See note 15 *supra*. *See, e.g.*, G. WILLIAMS, THE MENTAL ELEMENT IN CRIME 10 (1965), and articles and cases cited therein.

equivocal act of being in proximity to the drugs, to separate the blameworthy from the innocent.

In *Thomas v. State*,[55] the Indiana Supreme Court did not reach the question of whether proximity and legal authority to control the premises would be sufficient to "prove" by inference alone the required guilty knowledge, because additional evidence independent of those facts supported the finding of knowledge. For similar reasons, the question did not arise in *Weingart v. State*.[56] In *Ledcke v. State*[57] and *Smith v. State*,[58] cases in which the access to the drugs was shown but legal authority over the place where they were found was not shown, independent evidence aside from proximity showed knowledge. In *Phillips v. State*,[59] no evidence independent of proof of access suggested guilty knowledge, but, under the unique circumstances of the case, the accused had *sole* access to the place where the drugs were found so that proof of knowledge of the presence and character of the drug was not difficult to infer.

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[55]291 N.E.2d 557 (Ind. 1973). Among the additional facts shown pointing to guilty knowledge were that the defendant was a known heroin user with previous convictions, and, more importantly, the package of heroin was open with the heroin itself in plain view of the defendant in her seat inches away from the package in front of her.

[56]301 N.E.2d 222 (Ind. Ct. App. 1973). The accused was the owner, driver, and sole occupant of the car at the time of the arrest. A "roach-clip" was hanging from the front of his shirt. Most importantly, Weingart confessed his knowledge when he admitted "that he was surprised that he would be 'busted' for possessing such a small amount of marijuana." *Id.* at 225.

[57]296 N.E.2d 412 (Ind. 1973). Very heavy smoke permeated the entire apartment, and a great deal of marijuana lay openly all about the premises.

[58]316 N.E.2d 841 (Ind. Ct. App. 1974). The defendant had confessed to injecting himself with heroin immediately prior to the arrest, and apparatus for heroin use lay exposed about the motel room. Furthermore, the accused had "fresh" needlemarks on his arm. See note 51 *supra*.

[59]313 N.E.2d 101 (Ind. Ct. App. 1974). Phillips had been arrested for a non-drug related offense. After his arrest he was placed in the back seat of a police squad car. The back seat of the car was separated from the front by a sealed plastic window extending from the top of the back seat to the roof of the car. The car doors were locked. Phillips was the first and only person picked up by police and put in the back of the car from the beginning to the end of the shift. Immediately prior to picking up the defendant, the two officers assigned to the car had thoroughly cleaned out the inside of the car pursuant to a departmental order. The package of heroin was discovered where it lay in plain view on the floor of the back seat area of the car when the police opened the back door to let Phillips out upon arriving at the police station. Under the unique circumstances of the case it is clear that, assuming honesty on the part of the two police officers, no one but Phillips could have put the heroin in the place where it was found.

However, neither the driver nor the owner of the car in *Corrao v. State,*[60] nor the driver in *Von Hauger v. State,*[61] nor the renter in *Ludlow v. State*[62] had sole access to the places in which the drugs were found, yet the convictions of all these persons were upheld. But in *Greely v. State,*[63] the conviction of a homeowner without exclusive access to the drugs was overturned. If these cases are to be reconciled, it must be on the basis of the evidence presented to show the defendants' knowledge of the presence of the drugs independent of the proof of accessibility. As the subsequent analysis will demonstrate, the independent evidence of knowledge discussed by the courts is so similar in all four of these cases that the differences in results are explainable not by any difference in quantum of evidence but by the difference in approach to and scrutiny of the evidence taken by the *Greely* court on the one hand and the appellate courts in *Ludlow* and *Corrao* and the supreme court in *Von Hauger* on the other.

The reversal in *Greely* turned not upon the accused's proximity to the drugs but rather upon his lack of knowledge of the presence of them. "It is not the law that a homeowner is criminally liable for possession of everything on the grounds of his home. There must be some evidence that he had at least some knowledge of the presence of the material."[64] Thus the court was unwilling to accept an inference of guilty knowledge solely from the proof of the accused's legal authority over and ready access to the place in which the drugs were found. The *Greely* court could have distinguished such cases as *Corrao*[65] or *Von Hauger*[66] on the

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[60]290 N.E.2d 484 (Ind. Ct. App. 1972).

[61]254 Ind. 297, 258 N.E.2d 847 (1970).

[62]302 N.E.2d 838 (Ind. Ct. App. 1973), *rev'd on other grounds,* 314 N.E.2d 750 (Ind. 1974). In both courts, the accused argued that his conviction should be reversed for lack of sufficient evidence and because the search and seizure was unlawful because the police had no search warrant though they had ample time to procure one. The appellate court rejected both of appellant's arguments and discussed the evidence of the elements of the crime of possession. The supreme court reversed the conviction on fourth amendment grounds, thus finding it unnecessary to discuss the sufficiency of the evidence issue. The subsequent discussion in the text is therefore limited to the appellate court's analysis of the sufficiency of the evidence argument.

[63]301 N.E.2d 850 (Ind. Ct. App. 1973). The drugs were found in the defendant's backyard, which was not enclosed. Thus, anyone could enter the place where the drugs were found.

[64]*Id.* at 852.

[65]In *Corrao,* the defendants whose convictions were upheld were only a few feet from the drugs, whereas in *Greely* the accused was in his house at the time of the arrest, separated from the drugs in his backyard by some twenty to thirty feet.

[66]The drugs in *Von Hauger,* unlike *Greely,* were only a few feet from the defendant's reach.

basis of the *distance* which separated the defendant from the drugs, but it chose not to base its holding on proximity but rather on the knowledge element of the offense. In so doing, the *Greely* court made the reasoned judgment that while proximity may suggest knowledge under certain circumstances, it does not *prove* knowledge under any circumstances.

Evidence suggesting Greely's knowledge of the presence of the drugs independent of his ownership of the premises was offered the court but was deemed insufficient. A statement made by the person who had placed the drugs in Greely's yard that he had made "everyone" in Greely's house aware of the presence of the drugs was not sufficient to establish Greely's knowledge because, according to the court, there was no proof that "everyone" included Greely. This was in spite of the fact that the witness made the statement to "everyone" in the house not long before the arrest,[67] which reasonably suggests that Greely was so informed. Clearly, the court closely scrutinized the evidence to assure that Greely knew about the drugs, thus exemplifying its approach to voluntariness of possession and knowledge suggested by the statement that it is "obvious that to have constructive possession one must have some knowledge that the material is present."[68]

No such active scrutiny of the record for evidence of guilty knowledge independent of legal authority to control the place where the drug was found was undertaken by the Indiana Court of Appeals in *Ludlow v. State*.[69] The appellate court succinctly stated the grounds upon which the challenge of insufficient evidence was rejected:

> Appellant attempted to prevent entry into the house by police officers. Appellant gave his address when arrested as 3715 North Guion Road which were the premises involved here. Thus, Appellant exerted dominion and control over the house and its contents and therefore possessed the drugs in question via the doctrine of constructive possession.[70]

Though there was evidence in the record that the house was the scene of a continuous and long-standing drug-dealing operation, this evidence was pointed out by the Indiana Supreme Court[71] and

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[67]Greely v. State, 301 N.E.2d 850, 853 (Ind. Ct. App. 1973).

[68]*Id.* at 852. The court also quoted from the dissent in Von Hauger v. State, 254 Ind. 297, 301, 258 N.E.2d 847, 850 (1970), that "for the element of possession to be established it must be proven beyond a reasonable doubt that the person charged could knowingly exercise dominion or control over it." 301 N.E.2d at 852.

[69]302 N.E.2d 838 (Ind. Ct. App. 1973), *rev'd on other grounds*, 314 N.E.2d 750 (Ind. 1974).

[70]302 N.E.2d at 843.

[71]314 N.E.2d at 751.

was not mentioned by the appellate court. The implication of this omission is that the appellate court simply did not feel that any evidence beyond legal authority to control the premises where the drugs were found, and the defendant's proximity to the drugs, was necessary to "prove" constructive possession.

The only item mentioned by the appellate court in *Ludlow*, beyond defendant's presence and address, in connection with the sufficiency of the evidence issue is the fact that Ludlow tried to stop entry into the house by police. The police had no warrant, and the supreme court found that the forced entry by them without a warrant was, under the circumstances, unreasonable.[72] Hence, Ludlow acted within his constitutional rights in attempting to bar entry by the police. Even if Ludlow's lawful assertion of his constitutional rights were allowed to be presumptive of a motive to conceal something unlawful, illegal drugs were not the only thing Ludlow might have wanted to hide, since a friend of his within the house was a fugitive.[73] The appellate court did mention that the police were acting on a tip that drugs were in the house but, significantly, mentioned this fact in connection with its treatment of the fourth amendment issue, not with respect to the sufficiency argument.[74] The placement of the discussion of this evidence in the opinion suggests that the appellate court thought it only relevant to the fourth amendment issue. Moreover, had the court scrutinized that bit of evidence with the same degree of care for preserving the element of knowledge as did the *Greely* court, it would have recognized that the tip placed the drugs in a room which was not Ludlow's bedroom and which was not occupied by the defendant at the time of the arrest but rather was occupied by several other people.[75] Consequently, this evidence did *not* suggest Ludlow's personal knowledge of the drugs. The opinion of the appellate court in *Ludlow* thus suggests that the court felt that legal authority to control the premises equals practical ability to control its contents which equals constructive possession of drugs found therein.

In *Von Hauger v. State*,[76] the defendant was the non-driver owner and one of several occupants of a car in which a package of drugs was concealed under the front seat. The only evidence that pointed to any knowledge on the part of Von Hauger of the presence of the package was the testimony of the arresting officer that, as he approached the car from the rear, "he observed the appellant attempting to slide an object under the seat. . . . Upon

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[72] *Id.* at 753.

[73] 302 N.E.2d at 840.

[74] *Id.* at 839.

[75] *Id.* at 843.

[76] 254 Ind. 297, 258 N.E.2d 847 (1970).

investigating, the officer found the object to be an automatic pistol."[77] It was while recovering the *pistol* that the officer found the package containing the marijuana. How conduct of the accused pointing to knowledge of the presence of a pistol on the floor of the car establishes knowledge of the presence and character of a package of marijuana located nearby was never answered to the satisfaction of Justice Jackson and is the basis for his dissent.[78] It is Justice Jackson's emphasis on the necessity of proof of knowledge, apart from proof of proximity, as a prerequisite to a finding of "possession" that the appellate court relied upon in *Greely,* and it is noteworthy that neither the *Greely* nor the *Von Hauger* opinion was mentioned by the appellate court in *Ludlow.*

In *Corrao v. State,*[79] the only evidence tending to show the owner's and driver's knowledge of the marijuana, aside from their proximity and access to the trunk in which the marijuana was found, was the testimony of the arresting officer that he smelled marijuana as he approached the car. The officer did not say that he smelled the smoke of burning marijuana but only that he smelled the "odor" of marijuana.[80] While marijuana smoke coming from the car would imply knowledge of its occupants as to the presence of marijuana therein, the concurring judge aptly pointed out that the place where the incident occurred was a "'marijuana area.' . . . It is not surprising that some odor of the plant was perceptible."[81] In light of this analysis, it is clear that the majority in *Corrao* made little attempt to discover substantial independent evidence to support the inference of guilty knowledge made from the fact of the driver's and owner's access to the car trunk. This is true even as to the driver, whose practical access to the trunk was arguably no greater than the passengers' since he, like them, would need the owner's permission to enter the trunk.[82]

The foregoing discussion suggests that two conceptually different approaches have been employed in constructive possession cases: (1) the *Greely-Von Hauger* dissent approach, which reasons that knowledge is a prerequisite to possession such that possession is impossible without proof of knowledge, and (2) the *Ludlow* (appellate court)-*Von Hauger* majority approach, which views guilty knowledge as a distinct mens rea that is inferrable

[77] *Id.* at 298, 258 N.E.2d at 848.

[78] *Id.* at 299, 258 N.E.2d at 848.

[79] 290 N.E.2d 484 (Ind. Ct. App. 1972).

[80] *Id.* at 485.

[81] *Id.* at 486 n.1. By "marijuana area" the judge was referring to the fact that the immediate area surrounding the road was one in which a great deal of marijuana grew wild. It should also be noted that the officer's search of the inside of the car revealed no marijuana.

[82] See note 45 *supra.*

from proof of "possession." Admittedly, there may be little practical difference in result in the vast majority of cases in which factors independent of the accused's access and proximity to the drugs point to a guilty knowledge, for example, a confession, exclusive access to and control of the premises, flight, or the odor of burning marijuana. But in those cases in which proof of access is tantamount to proof of possession and no independent evidence exists of knowledge beyond the showing of proximity of the accused, among other persons, to the place where the drugs are found, the approach employed can make a great deal of difference in distinguishing purposeful action from inadvertent conduct.

IV. Proof of the Elements of the Offense in Other Jurisdictions

A few states do not require the State to prove beyond a reasonable doubt that the defendant knowingly and/or intentionally "possessed" the unlawful drug.[83] Washington is one such state.[84] Indiana, of course, purports to follow the opposite view, requiring a showing of intent to possess the prohibited drug.[85] Nevertheless, cases from the two states often have the same result. In two Washington cases, the defendant cotenants not having sole access to the houses were convicted when drugs were found in closed containers in a bottle in a cabinet in a "common room," the kitchen,[86] and on the floor in the bedroom of one of the defendants.[87] These defendants' knowledge was not in issue under Washington law, but had these cases taken place in Indiana, the announced rules imply that knowledge would have been in issue if the appeals were taken on the same grounds as the Washington appeals—insufficient evidence. The logic of the appellate court in *Ludlow* and the majority in *Von Hauger* suggests the same result as in the Washington cases—affirmance of the convictions. But the reasoning of the court in *Greely* arguably suggests a dif-

[83]See the listing of the states' views on the mens rea aspect of drug possession in Annot., 91 A.L.R.2d 821 (1963).

[84]"There is no element of guilty knowledge or intent in the charge of possession of narcotics." State v. Edwards, 514 P.2d 192, 193 (Wash. Ct. App. 1973). The Washington Supreme Court has explicitly *rejected* "a California rule that proof of opportunity of access to narcotics, or a place where narcotics are found, without a showing of knowledge or intent . . . will not support a finding of unlawful possession." State v. Mantell, 430 P.2d 980, 982 (Wash. 1967).

[85]"The accused must also have actual knowledge of the presence of the item." Corrao v. State, 290 N.E.2d 484, 487 (Ind. Ct. App. 1972), *citing* Malich v. State, 201 Ind. 587, 169 N.E. 531 (1930). See section II of the text. Regarding "intent," see note 14 *supra*.

[86]State v. Singleton, 9 Wash. App. 399, 512 P.2d 1119 (1973).

[87]State v. Wheatley, 519 P.2d 1001 (Wash. Ct. App. 1974).

ferent result, especially on the facts of the case in which the drugs were found in the kitchen.

Texas is among the majority[88] of states which, like Indiana,[89] requires the State to show guilty knowledge on the part of the accused in drug possession cases.[90] Oregon[91] and Colorado[92] employ similar rules. In Texas, Oregon, and Colorado, the doctrines of constructive possession and joint possession are followed.[93] However, cases involving similar fact situations have resulted in affirmance of convictions in Indiana but reversals on certain counts in Texas, Oregon, and Colorado, though all four puportedly require that the same elements be proved by the State.[94] This apparent anomaly is explained by the fact that the Texas, Oregon, and Colorado courts employed the approach of *Greely* and the dissent in *Von Hauger,* whereas the Indiana courts in the cases to be discussed considered the problem according to the *Ludlow* (appellate court)-*Von Hauger* majority approach.[95] In these cases the approach does make a difference—it is the *Greely* approach which compels the court diligently to search the record for additional independent evidence of knowledge beyond access and legal authority. Unless such a search is compelled, punishment may be inflicted upon those who are not blameworthy beyond a reasonable doubt.

In *State v. Moore,*[96] the Oregon Court of Appeals reversed the defendants' convictions for constructive possession of the marijuana found in two pipes in plain view on the living room table

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[88]Arizona, Colorado, Illinois, Louisiana, Montana, Nevada, New Mexico, New York, and Texas are cited as adherents to the majority rule. Annot., 91 A.L.R.2d 821 (1963).

[89]See note 85 *supra.*

[90]*See* Medina v. State, 164 Tex. Crim. 16, 296 S.W.2d 273 (1956).

[91]"[T]o prove constructive possession of a dangerous drug or narcotic the state must show that the defendant knowingly exercised control of or the right to control the unlawful substance." State v. Moore, 511 P.2d 880, 882 (Ore. Ct. App. 1973).

[92]Petty v. People, 167 Colo. 240, 447 P.2d 217 (1968). *Petty* is quoted as authority for the inclusion of a mens rea in the offense of unlawful drug possession in Feltes v. People, 178 Colo. 409, 498 P.2d 1128 (1972), and the *Feltes* language is quoted verbatim by the Indiana Supreme Court in Thomas v. State, 291 N.E.2d 557, 559 (Ind. 1973). See note 22 *supra.*

[93]*See* cases cited in notes 90-92 *supra.*

[94]*Compare* Petty v. People, 167 Colo. 240, 447 P.2d 217 (1968), *and* State v. Moore, 511 P.2d 880 (Ore. Ct. App. 1973), *and* Wright v. State, 500 S.W.2d 170 (Tex. Crim. App. 1973), *with* Ledcke v. State, 296 N.E.2d 412 (Ind. 1973), Von Hauger v. State, 254 Ind. 297, 258 N.E.2d 847 (1970), *and* Ludlow v. State, 302 N.E.2d 838 (Ind. Ct. App. 1973), *rev'd on other grounds,* 314 N.E.2d 750 (Ind. 1974), *and* Corrao v. State, 290 N.E.2d 484 (Ind. Ct. App. 1972).

[95]See text accompanying notes 69-82 *supra.*

[96]511 P.2d 880 (Ore. Ct. App. 1973).

and in a third pipe on top of a dresser in an adjoining bedroom of the apartment in which the defendant resided with several other persons. The reversal was based on an absence of proof of the defendant's knowledge and control of the marijuana. Unlike the Indiana Court of Appeals in *Ludlow v. State,*[97] the Oregon court was apparently unwilling to allow proof of the requisite knowledge and control merely by inference from the accused's access to and legal authority over the premises where the drugs were found. As to the cotenant Smith in *Petty v. People,*[98] the Colorado Supreme Court was unwilling to allow legal authority and the practical access that normally follows proximity to constitute constructive possession where marijuana was found in two open cartons in different rooms of the apartment. The Colorado court felt that independent proof of knowledge was necessary to show voluntary control. In the Pennsylvania case of *Commonwealth v. Florida,*[99] the court refused to allow the convictions of four appellants found in the same room with a jar of marijuana displayed in plain view, thus indicating their ready access and proximity to the drugs though the four appellants had no legal authority to control the premises. The circumstances in the Pennsylvania case compel conviction even more so than the facts in *Von Hauger, Corrao,* or *Ledcke,* but the Pennsylvania court refused to hold that the inference of knowledge and control which could be drawn from proof of access is sufficient proof of the control necessary for "constructive possession."

A similar attitude was taken by the Texas Court of Criminal Appeals in *Wright v. State,*[100] in which the court stated succinctly the emphasis in the out-of-state cases discussed which was arguably present in *Greely,* but not in *Corrao, Von Hauger, Ludlow* and *Ledcke,* and which may explain the different results in those cases:

> Thus, in furnishing the "affirmative link" between the accused and the narcotic, additional independent facts and circumstances *must* be established indicating the accused's knowledge of the narcotic as well as his control over such.[101]

It is apparent that this emphasis imports a realization of the fact that "control" or "ability to control," as it has so often been

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[97]302 N.E.2d 838 (Ind. Ct. App. 1973), *rev'd on other grounds,* 314 N.E.2d 750 (Ind. 1974). See the analysis of the evidence of knowledge the appellate court thought necessary to prove the offense at text accompanying notes 69-75 *supra.*

[98]167 Colo. 240, 447 P.2d 217 (1968).

[99]441 Pa. 534, 272 A.2d 476 (1971).

[100]500 S.W.2d 170 (Tex. Crim. App. 1973).

[101]*Id.* at 171.

"proved" in cases of constructive possession, may mean no more than mere accessibility to the drugs and that therefore additional proof of knowledge is necessary to distinguish the inadvertent neighbor from the deliberate possessor. The emphasis on facts independent of accessibility is the practical effect of the *Greely* approach and insures that the failure of a person, without exclusive access to the premises, to take action to eliminate the condition of his proximity to the drugs is a truly voluntary actus reus.

The evidence deemed sufficient to prove the knowledge ostensibly required for constructive possession by the courts in *Von Hauger, Ludlow,* and *Corrao* has been analyzed[102] and has been found wanting. The posture of the Indiana courts in those three cases with respect to allowing knowledge to be inferred solely from accessibility and authority in *Ludlow,* and from mere accessibility without lawful authority in *Von Hauger* and *Corrao,* presents a marked contrast to the approach taken by the courts of Pennsylvania, Oregon, and Colorado, as well as to the approach employed in *Greely* and by the dissent in *Von Hauger.* The contrast is not diminished by the fact that the *Corrao* court purported to follow the Colorado rule.[103] Under the *Corrao-Ludlow-Von Hauger* approach, the statement of the Indiana Supreme Court that once "possession is established, knowledge of the character of the drug and the fact that it is possessed can be inferred therefrom,"[104] is, by corruption of the word "possession" by the adjective "constructive," transmuted into "once proximity, and thus accessibility, is established, knowledge of the character and the fact that it is possessed can be inferred therefrom." This trans-

[102]See section III of the text.

[103]The *Corrao* court quoted from the Colorado court in Petty v. People, 167 Colo. 240, 447 P.2d 217 (1968), that "where a person is in possession, but not in exclusive possessive of the premises, it may not be inferred that he knew of the presence of marijuana there and had control of it unless there are statements or other circumstances tending to buttress the inference." 290 N.E.2d at 487-88. The Colorado court was quoted by the Indiana Supreme Court in Thomas v. State, 291 N.E.2d 557, 559 (Ind. 1973), but the *Thomas* court failed to include the *Petty* court's requirement of independent proof of knowledge beyond proof of possession of the premises. The appellate court in *Ludlow* cited the supreme court's opinion in *Thomas* as authority for the concept of joint constructive possession and, like the *Thomas* court, omitted the qualification to that concept expressed in the original *Petty* rule as stated above. 302 N.E.2d at 843. The phrase "not in exclusive possession" as referred to in *Petty* has been construed by the courts dealing with joint constructive possession cases to apply to cases where the defendant may be the sole owner of the premises but does not have sole access to the place. *See* Petty v. People, 167 Colo. 240, 447 P.2d 217 (1968); Wright v. State, 500 S.W.2d 170 (Tex. Crim. App. 1973). Thus, an individual who is the sole "owner" of the premises is "not in exclusive possession" of that property if people other than himself have easy access thereto at the time of the arrest.

[104]Thomas v. State, 291 N.E.2d 557, 559 (Ind. 1973).

mutation is unacceptable because it makes constructive possession an "act" that can be completely inadvertent and involuntary. To prevent this, evidence additional to and independent of proof of proximity must be adduced, or possession of dangerous drugs becomes a crime of strict, absolute liability.

V. Why Not Strict Liability for Possession of Unlawful Drugs

The discussion immediately preceding assumes that it is desirable to punish only those morally blameworthy for the offense of possession of dangerous drugs, that is, those who intend to possess them. As the Washington cases suggest, not all states feel that the crime of possession of unlawful drugs ought be a traditional mens rea crime. Those few states in accord with Washington would suggest that this crime could be one of strict liability.[105] Arguments of authority, policy, and reason compel the conclusion that it is desirable to punish *only* those who knowingly and intentionally possess dangerous drugs and not to force individuals to act at their own peril.

The Indiana courts have repeatedly stated that a person is not guilty of possession of a dangerous drug unless that possession is shown to be knowing, voluntary, and with an intent to possess.[106] Thus, strict liability for this offense would be in direct contradiction to the law as stated by the Indiana higher courts and would be inconsistent with the general state of criminal law in Indiana today.

> Indiana has taken what may be characterized as an enlightened or legally correct view in requiring mens rea in many statutory offenses. . . . Strict liability has been restricted by and large to matters which concern the public at large such as in matters dealing with food stuffs or economics. It has been avoided usually in other offenses. To the state's credit, this approach has not been swept along by a modern trend but is deeply engrained in older authorities.[107]

Obviously, unlawful drug possession does not affect the public at large in the same way as matters involving food and economics. The one "glaring exception" to the mens rea approach in

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[105]Maryland, Florida, and Massachusetts agree with Washington that the State need not prove that the possession was knowing or intentional. Annot., 91 A.L.R.2d 821, 826-27 (1963).

[106]*See, e.g.*, Thomas v. State, 291 N.E.2d 557 (Ind. 1973); Corrao v. State, 290 N.E.2d 484 (Ind. Ct. App. 1972). The most recent version of the Indiana statute for this offense states that the possession must be knowing and intentional. See note 1 *supra*.

[107]Force, *Mens Rea v. Strict Liability*, 9 Res Gestae 11, 14 (Aug. 1965).

Indiana is the area of statutory rape: "With regard to [statutory rape] the courts have imposed strict liability and have rejected intent as an element of the offense . . . ."[108] The salient feature of statutory rape is obviously illicit sex, hardly a characteristic of unlawful drug possession. The fact that economic regulations and statutory rape have little in common with possession of illegal drugs suggests that the policy considerations which have prompted the courts to depart from their general mens rea approach to make violations of economic regulations and statutory rape strict liability would not apply to possession of dangerous drugs.

The Indiana courts have traditionally used a malum prohibitum—mala in se distinction[109] to determine which statutory offenses ought be strict liability and which ought entail a mens rea. Such a distinction, requiring as it does a value judgment as to what acts are inherently evil, is of dubious value in a borderline case between good and evil in which drug possession might be considered. Moreover, the distinction seems to lose all force in light of the fact that the only apparent reason for considering statutory rape a strict liability offense is precisely because of an " 'acknowledged public policy' [that] sexual relations between unmarried persons is wrong."[110] A more functional and more useful approach to the problem of distinguishing statutory offenses thought to require a mens rea from those seen as strict liability was articulated by a federal district court applying Indiana law in a pollution case.[111] Pollution was held to be a strict liability offense because the "public is injured just as much by unintentional pollution as it is by deliberate pollution."[112] Applying that logic to the offense of possession of unlawful drugs, it seems clear that the public at large is no more injured by an individual's inadvertent positioning of himself in proximity to a place where illegal drugs are found than by the mistaken taking of another's property, the latter conduct being excused without exception in Indiana today.[113]

Much has been said by the judiciary[114] as well as the com-

[108]*Id.* at 13.

[109]The notion is that mala in se offenses, *i.e.*, those "inherently and naturally evil as adjudged by the senses of a civilized society," require proof of mens rea because such acts are "wrong and criminal by reason of such knowledge or intent." Gregory v. State, 291 N.E.2d 67, 68 (Ind. 1973).

[110]Force, *supra* note 107, at 14.

[111]United States v. United States Steel Corp., 328 F. Supp. 354 (N.D. Ind. 1970).

[112]*Id.* at 356.

[113]*See, e.g.*, Roark v. State, 234 Ind. 615, 130 N.E.2d 326 (1955).

[114]*See, e.g.*, Morissette v. United States, 342 U.S. 246 (1952). In his opinion, Justice Jackson noted the trend towards making certain "public welfare" offenses strict liability and that judicial acceptance of the trend "has not . . . been without expressions of misgiving." *Id.* at 256. He suggested

mentators[115] as to why society should reverse its penal sanctions for the deliberate wrongdoer as opposed to the inadvertent violator of the letter of the law. The mens rea principle has been variously articulated in terms of "intent," "guilty knowledge," "scienter," and the like,[116] but "reduced to its essence it referred to the choice to do a blameworthy act."[117] Blackstone's principle that "an unwarrantable act without a vicious will is no crime at all"[118] emphasizes the common law view that it is the "evil intent" which makes the act criminal, and without such intent the harmful act is simply another example of human fallibility for which the punishment of an individual would be "just plain unfair."[119] The utilitarian view[120] rationalizes the mens rea principle in terms of its logical relationship to an overriding principle of modern punishment—deterrence. This viewpoint asks how unintentional acts can be deterred by threat of punishment since such acts by definition are not committed by choice.[121] Regarding the offense of constructive possession of unlawful drugs, insofar as the actus reus is reducible to a status of proximity to the drug, the requirement of knowledge as necessary to the voluntary bringing about or altering that status may be of constitutional proportions.[122] That reason and a public policy fundamental to the Anglo-

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that judicial acceptance of statutory crimes of strict liability might be limited to "petty offenses" and crimes where the punishment invoked is "relatively small." *Id.* The Indiana Supreme Court has apparently *not* seen the penalty for illegal drug possession to be so "small" as to construe it as a "public welfare offense" *without* a mens rea. See note 14 *supra.*

[115]*See, e.g.*, FREEDOM AND RESPONSIBILITY (H. Morris ed. 1961); G. WILLIAMS, THE MENTAL ELEMENT IN CRIME (1965).

[116]G. WILLIAMS, THE MENTAL ELEMENT IN CRIME 9-10 (1965); *see also* the discussion in Morissette v. United States, 342 U.S. 246, 250-60 (1952).

[117]Kadish, *The Decline of Innocence*, 26 CAMBRIDGE L.J. 273 (1968).

[118]2 W. BLACKSTONE, COMMENTARIES *21.

[119]*See, e.g.*, H.L.A. HART, PUNISHMENT AND RESPONSIBILITY (1968); Kadish, *The Decline of Innocence*, 26 CAMBRIDGE L.J. 273 (1968); Perkins, *A Rationale of Mens Rea*, 52 HARV. L. REV. 905 (1939).

[120]*See, e.g.*, J. BENTHAM & J.S. MILL, THE UTILITARIANS 164-66 (1961); Hart, *Murder and the Principle of Punishment: England and the United States*, 52 NW. U.L. REV. 433, 447-53 (1957).

[121]See authorities cited in note 120 *supra.*

[122]*See* Robinson v. California, 370 U.S. 660 (1962); Lambert v. California, 355 U.S. 225 (1957). *But cf.* Powell v. Texas, 392 U.S. 514 (1968). In *Powell*, Justice Marshall wrote the plurality opinion of the Court stating that *Robinson* only required "some actus reus" but did not say that conduct could not be punished because it is, in some sense, "involuntary." *Id.* at 533. The statement in *Powell* suggests that knowledge is separable from the actus reus and voluntariness has a different meaning than choice. *Contra*, Kilbride v. Lake, N.Z.L.R. 590 (1962). A discussion of the confusion as to the precise meaning of these terms can be found in Kadish, Book Review, 78 HARV. L. REV. 907 (1965), *reviewing* N. MORRIS & C. HOWARD, STUDIES IN CRIMINAL LAW (1964).

American legal system mandate mens rea as a condition of culpability has been succinctly stated by a leading commentator:

> Our system does not interfere till harm has been done and has been proved to have been done with the appropriate mens rea. But the risk that is here taken is not taken for nothing. It is the price we pay for general recognition that a man's fate should depend upon his choice and this is to foster the prime social virtue of self-restraint.[123]

VI. Conclusion

A conviction for possession of unlawful drugs in violation of the Indiana statute[124] may rest upon a theory of actual or constructive possession.[125] Proof of either theory may be made by circumstantial evidence alone as well as by direct evidence. Actual possession is essentially physical control of the drugs, which control is exercised by the accused at the time he is approached by the arresting officers.[126] Constructive possession has been held to embrace a wide variety of situations, the key feature being the accessibility of the drugs to the accused. Accessibility has often been inferred from the accused's legal authority to control the place where the drugs are found.[127] Legal authority over the premises is not essential in all cases. The Indiana courts have been willing to accept the inference of access to the drugs from the accused's proximity to the place in which the drugs are located,[128] even when the accused is only one of many persons in proximity to the place where the drugs are found.[129] It has been suggested that the doctrine of constructive possession, so applied, is capable of serious abuse so as to allow the conviction of persons who are inadvertently close to hidden drugs. The approach to mens rea for constructive possession employed by at least some Indiana courts[130] provides no real check on the constructive possession doctrine and allows no guide to distinguish the inadvertent accused from the deliberate law-breaker. Instead, the approach allows the required guilty knowledge to be supplied wholly by

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[123]H.L.A. Hart, Punishment and Responsibility 182 (1968).

[124]See note 1 *supra*.

[125]Rose v. State, 281 N.E.2d 486, 488 (Ind. 1972).

[126]*Id.* See section II of the text.

[127]*See, e.g.*, Ludlow v. State, 302 N.E.2d 838 (Ind. Ct. App. 1973), *rev'd on other grounds*, 314 N.E.2d 750 (Ind. 1974).

[128]*See, e.g.*, Ledcke v. State, 296 N.E.2d 412 (Ind. 1973).

[129]*Id.*

[130]*See* Von Hauger v. State, 254 Ind. 297, 258 N.E.2d 847 (1970); Ludlow v. State, 302 N.E.2d 838 (Ind. Ct. App. 1973), *rev'd on other grounds*, 314 N.E.2d 750 (Ind. 1974); Corrao v. State, 290 N.E.2d 484 (Ind. Ct. App. 1972).

inference from the equivocal "act" of being close to a place where drugs are hidden. The better approach, employed by the courts of several other states,[131] one district of the Indiana Court of Appeals,[132] and a dissenting Indiana Supreme Court justice,[133] views knowledge as a prerequisite to a voluntary act of possession of a dangerous drug and, to preserve that principle, requires strong evidence of knowledge independent of and in addition to the evidence of accessibility. The approach advocated realizes the vagueness and equivocality of the "act" of "constructive possession," as that term has sometimes been applied to be no more than proximity, and is therefore reluctant to allow from such equivocal conduct the inference of guilty knowledge, the element which draws the line between the unintentional and the deliberate violator. A firm adherence to the requirement of independent proof of knowledge not only preserves the mens rea as an element of this offense, which reason, policy, and authority in Indiana require, but provides a realistic check on the nebulous concept of "constructive possession."

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[131]See notes 90-92 *supra*.

[132]Greely v. State, 301 N.E.2d 850 (Ind. Ct. App. 1973) (first district).

[133]Von Hauger v. State, 254 Ind. 297, 299, 258 N.E.2d 847, 848 (1970) (Jackson, J., dissenting).

Minors and Contraceptives in Indiana

I. Introduction

A discussion of teenage sexuality tends to activate attitudes and fears not conducive to rational decision-making. The controversy surrounding sex education indicates that sex-related information is still viewed by many as a cultural taboo which should be kept hidden from inquiring young minds. Sexual ignorance does not, however, discourage sexual experimentation. Rather, it allows response to social and biological pressures to become sexually active without appreciation of the possible consequences of that activity. The purpose of this Note is to show that, because teenage sexuality realistically cannot be proscribed, an effort must be made to minimize the short and long term deleterious effects of such activity.

II. Effects of Sexual Activity Among Minors

In extending the right to consent to medical care necessary for the treatment of venereal disease to individuals below the age of twenty-one,[1] the Indiana General Assembly, in effect, recognized that unmarried minor individuals participate in sexual intercourse and that medical problems requiring legislative solution may result therefrom. This recognition was necessary in light of the incidence of venereal disease among young people. In 1973 alone, 4,087 cases of gonorrhea and syphilis were reported in Indiana in individuals below the age of twenty, which was 32.6 percent of all cases reported for that year.[2] The statute passed by

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[1] Any person under the age of twenty-one (21) years who has, suspects he or she has, or who has been exposed to any venereal disease, shall be competent to give consent for medical or hospital care or treatment of himself or herself.

Act of Feb. 20, 1969, ch. 43, § 1. Ind. Pub. L. No. 97, § 10 (April 24, 1973), deleted "under the age of twenty-one (21) years." Current language is codified at Ind. Code § 16-8-5-1 (Burns 1973).

[2] Table I

Incidence of Venereal Disease in Indiana—1973

Age Range	*Total Cases in Age Range (male & female)*	*Female Cases in Age Range*	*Female Cases in Range Compared to Total Cases in Range (%)*	*Female Cases in Range Compared to Total Cases (%)*	*Total Cases in Range Compared to Total Cases (%)*
Below 10	23	18	78.3	.1	.2
10-14	131	102	77.9	.8	1.0
15–19	3933	2141	54.4	17.1	31.4

the legislature encourages young individuals exposed to venereal disease to seek medical treatment without parental intervention.[3]

Venereal disease is not, of course, the only problem resulting from sexual intercourse among minors. Of the 83,882 total births in Indiana in 1973, 9,409 (11.2 percent) were illegitimate.[4] Of these illegitimate births, 4,167 were to women below the age of nineteen, amounting to 44.3 percent of the total illegitimate births for that year.[5] Although, in Indiana, abortion was not a legal alternative to pregnancy until May, 1973,[6] 621 or 36.7 percent of the 1,692 abortions reported in this state through December, 1973, were performed upon women below the age of twenty.[7] It

Below 20	4087	2261	55.3	18.0	32.6
Total Cases	12530	4927	39.3	39.3	100.0

From Semi-Annual Reports of Civilian Cases of Primary and Secondary Syphilis and Gonorrhea by Reporting Source, Color, Sex, and Age Group, June 30 & Dec. 31, 1973 (unpublished reports filed with Indiana State Board of Health, Division of Communicable Disease Control).

[3]The statute also encourages physicians to provide medical treatment. See text accompanying notes 39-53 *infra*.

[4]

Table II

Incidence of Illegitimacy in Indiana—1973

Age Range	*Illegitimate Births in Age Range*	*Illegitimate Births in Range Compared to Total Illegitimate Births (%)*	*Illegitimate Births in Range Compared to Total Births* (%)*
12	3	—	—
13	36	.4	.0
14	206	2.2	.2
15	562	6.0	.7
16	983	10.4	1.2
17	1156	12.3	1.4
18	1221	13.0	1.5
12–17	2946	31.3	3.5
12–18	4167	44.3	5.0
Total Illegitimate Births	9409	100.0	11.2

*Total Births = 83,882

From unpublished computer data available from Indiana State Board of Health, Division of Public Health Statistics.

[5]See Table II, *supra* note 4.

[6]Ind. Pub. L. No. 322 (April 24, 1973), *codified at* IND. CODE §§ 35-1-58.5-1 to -4 (IND. ANN. STAT. §§ 10-107 to -110, Burns Supp. 1974).

[7]

Table III

Incidence of Abortions Reported in Indiana—1973

Age Range	*Total Abortions in Age Range*	*Total Abortions in Range Compared to Total Abortions (%)*
Below 15	43	2.5
15-19	578	34.2
Below 20	621	36.7

is reasonable to assume that a large percentage of these young women were not married at the time. Since 4,788 young women were reported to have had either an illegitimate child or an abortion in 1973, and only 2,261 cases of venereal disease were reported for women below the age of twenty,[8] the need for legislative efforts to avoid teenage pregnancy, as well as teenage venereal disease, is evident. This conclusion is further strengthened by indications that sexual activity among teenagers has greatly increased in recent years,[9] calling into question the efficacy of current statutory schemes.

III. Legislative Proscription of Sexual Activity Among Minors

Prior Indiana statutory efforts to control teenage sexual activity, except for the venereal disease consent statute,[10] have largely been directed against the sexual act itself rather than against the problems which are caused by the sex act. Any preventive aspects of the statutes lie in their provisions for punishment of illicit sexual activity.

A. Rape Statutes

One of the traditional efforts to discourage sexual intercourse with young females is represented by the statutory rape clause of the general rape statute,[11] which provides strict liability for one having sexual intercourse with a female child below the age of sixteen.[12] The statute comprehends no consent defense, for neither force nor lack of consent are elements of this purely statutory offense.[13] The two to twenty-one year determinant sentence when the woman is between twelve and sixteen years old, and the life sentence when the woman is less than twelve years

Above 19	1071	63.3
Total Abortions	1692	100.0

From Reports of Induced Abortions by County and Age, Period Jan. 1, 1973, to Dec. 31, 1973 (unpublished chart filed with Indiana State Board of Health, Division of Vital Statistics).

[8]See Table I, *supra* note 2. These statistics are relied upon only for comparison. The stigma attached to venereal disease, abortion, and illegitimacy, as well as other factors, may result in inaccuracies in the figures due to unreported instances of these problems.

[9]Time, Nov. 25, 1974, at 91.

[10]Ind. Code § 16-8-5-1 (Burns 1973).

[11]*Id.* § 35-13-4-3 (Ind. Ann. Stat. § 10-4201, Burns Supp. 1974).

[12]"Whoever has carnal knowledge of . . . a female child under the age of sixteen [16] years . . . is guilty of rape . . . ." *Id.*

[13]Mann v. State, 205 Ind. 491, 186 N.E. 283 (1933). *See also* Kelly v. State, 258 Ind. 196, 280 N.E.2d 55 (1972); Caudill v. State, 224 Ind. 531, 69 N.E.2d 549 (1946); Eckert v. State, 197 Ind. 412, 147 N.E. 150 (1925).

old,[14] serve as a positive deterrent to a male wishing to have sexual intercourse with her.[15] The statute produces inequitable results if the victim manifested her consent to the sexual contact and reasonably appeared to her partner to be past the age of consent. But the legislature, in an attempt to protect the interests of the woman, has determined that women below the age of sixteen shall not be competent to give such consent.[16]

If the woman has reached the age of sixteen, the sexual contact, to constitute rape, must be "forcibly against her will."[17] The criminal assault and battery statute[18] also contains specific provisions against sexual contact amounting to assault and battery upon individuals below the age of seventeen,[19] but this statute requires not only an overt act, but also a specific intent to gratify sexual desires.[20] When this specific intent cannot be established, the State may rely upon the more general statute of assault and battery with intent to commit a felony.[21]

B. Juvenile Delinquency Statutes

The juvenile delinquency statute,[22] which allows minors who come within the provisions of the statute to be treated as misdemeanants, may be used against minors who participate in illicit sexual intercourse. As held in *Tullis v. Shaw*,[23] this activity constitutes indecent and immoral conduct as contemplated by the statute. It is a misdemeanor to knowingly contribute to or encourage such conduct[24] if the offender also has knowledge of the

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[14] IND. CODE § 35-13-4-3 (IND. ANN. STAT. § 10-4201, Burns Supp. 1974).

[15]
> The word "whoever" as used in this statute [defining the offense of rape of a female child under the age of sixteen years] includes every male person with sufficient age and development to perform sexual intercourse and sufficient mentality to entertain a criminal intent.

Caudill v. State, 224 Ind. 531, 535, 69 N.E.2d 549, 550-51 (1946).

[16] The proposed Indiana Penal Code would place "statutory rape" within "indecent liberties with a child," would extend its protection to include male and female individuals below the age of sixteen, and would restrict the reach of the statute to persons eighteen years or older. INDIANA CRIMINAL LAW STUDY COMM'N, INDIANA PENAL CODE § 35-12.1-4-3 (Proposed Final Draft, 1974).

[17] IND. CODE § 35-13-4-3 (IND. ANN. STAT. § 10-4201, Burns Supp. 1974).

[18] *Id.* § 35-1-54-4 (IND. ANN. STAT. § 10-403).

[19] *Id.*

[20] *See, e.g.*, Markiton v. State, 236 Ind. 232, 139 N.E.2d 440 (1957) (applying statutory intent requirement unchanged in the statute's present form).

[21] IND. CODE § 35-1-54-3 (IND. ANN. STAT. § 10-401, Burns Supp. 1974).

[22] *Id.* § 31-5-4-1 (Burns 1973).

[23] 169 Ind. 662, 83 N.E. 376 (1908).

[24] IND. CODE § 31-5-4-2 (Burns 1973).

victim's minority.[25] Thus, the State may reach and punish both the minor and the one encouraging the conduct, but with less harsh penalties than are prescribed for the felonies of rape and assault and battery with intent to gratify sexual desires.

C. Other Statutes

Other statutes are used in an attempt to discourage illicit sexual intercourse. An anti-fornication statute may reach this result, usually by making such activity a misdemeanor. The Indiana statute[26] is deficient for these purposes since it is directed against cohabitation and does not include occasional acts of sexual intercourse.[27] An unmarried female[28] or her father or guardian[29] may sue for damages under the civil seduction recovery statute if she has not reached eighteen.[30] The statute thus subjects a male having sexual intercourse with a female below the age of eighteen to possible civil as well as criminal liability.

D. Efficacy of Statutory Proscription

The venereal disease[31] and illegitimate pregnancy[32] statistics indicate that the provision of penalties for illicit sexual activity is insufficient as a deterrent to such activity. Despite the possible legal implications of her actions, a minor woman who has become sexually active may be as fertile as an adult woman, but may be far less financially and emotionally able to cope with pregnancy, childbirth, and motherhood. Because of her physical immaturity,[33] she may expose herself to increased risks of pregnancy complications and expose her child to increased risks of infant mortality. She may be required by school policy to leave school

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[25]Davidson v. State, 249 Ind. 419, 233 N.E.2d 173 (1968).

[26]IND. CODE § 35-1-82-2 (IND. ANN. STAT. § 10-4207, Burns 1956).

[27]The proposed Indiana Penal Code makes no reference to an anti-fornication statute. Rather, it would rely upon other proposed codifications to discourage nonconsensual sexual contacts. INDIANA CRIMINAL LAW STUDY COMM'N, INDIANA PENAL CODE §§ 35-12.1-4-1 (rape), -2 (deviate sexual conduct), -3 (indecent liberties with a child).

[28]IND. CODE § 34-1-1-5 (Burns 1973).

[29]*Id.* § 34-1-1-6.

[30]*Id.* § 34-4-4-1 (Burns Supp. 1974) (abolishes cause of action for seduction of females eighteen and over).

[31]See Table I, *supra* note 2.

[32]See Table II, *supra* note 4.

[33]*See* Menken, *Teenage Childbearing: Its Medical Aspects and Implications for the United States Population*, in 1 UNITED STATES COMM'N ON POPULATION GROWTH AND THE AMERICAN FUTURE, RESEARCH REPORTS 331, 335 (C. Westoff & R. Parke, Jr., eds. 1972).

during her pregnancy,[34] or it may be necessary for her to leave school in order to support her child. She may choose to give up the child for adoption or be forced by social pressures to marry before she would otherwise have chosen to do so. Her family may assume the added burden of support, or the State may force the putative father to fulfil his legal support obligations.[35] Whatever the woman's decision may be, it will unalterably affect her future opportunities.[36]

IV. Contraceptive Information, Treatment, and Devices

A. Liability of the Physician

Contraception allows the woman to avoid the far-reaching consequences of pregnancy and the necessity of resorting to abortion, itself a source of great controversy. By increasing the availability to minors of contraceptive information, treatment, and devices, a decrease in teenage pregnancy and venereal disease should logically follow. However, the more effective impermanent contraceptive methods for women, such as the oral contraceptive, the diaphragm, and the intra-uterine device, require individual medical attention. A physician, rather than a legislator or a judge, is in the position to ascertain the contraceptive needs of the woman and to advise her as to the methods best suited for those needs. Medical training is necessary to weigh the relative risks of the oral contraceptive against its protective value,[37] to determine the advisability of an intra-uterine device or a diaphragm, or to decide whether the condom would be preferable to methods which require more medical attention.[38]

However, a physician may be prevented from providing contraceptive treatment to a minor by basic tort law which seeks to protect individuals from unauthorized invasions of the body by requiring that such contacts be validly consented to by the re-

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[34] A 1968 study of school systems with 12,000 or more students was conducted by the Educational Research Service. One-third of the 154 systems queried required girls to leave school as soon as it was known that they were pregnant. An additional one-fifth forced them to leave well before the end of pregnancy.

Id. at 348.

[35] Ind. Code §§ 31-4-1-1 to -33 (Burns 1973).

[36] *See* Menken, *supra* note 33, at 335.

[37] *See* Berman & Dolan, *The Oral Contraceptive: An Interest Analysis*, 21 Kan. L. Rev. 493 (1973).

[38] *See* David, *Unwanted Pregnancies: Costs and Alternatives*, in 1 United States Comm'n on Population Growth and the American Future, Research Reports 439 (C. Westoff & R. Parke, Jr., eds. 1972).

cipient.[39] Medical treatment, such as the pelvic examination required in the process of prescribing contraceptives to women, would constitute an invasion of the body. Not only must consent to the treatment be obtained so that the treatment will not amount to a technical battery[40] but, as well, the consent must be voluntary and informed and made by a person capable of consenting.[41]

It is this "capacity to consent" requirement which causes most of the problems in the area of medical treatment for minors. A child is considered to be incapable of exercising the requisite informed consent; the parent or guardian of the child must provide this consent.[42] A physician treating a minor without such consent would be open to a possible suit by the parents for assault and battery.[43] Although the damages recoverable by the parents would apparently be limited to medical expenses and loss of the child's services,[44] the threat of litigation may discourage the physician from providing the services he considers necessary.[45] Research reveals no successful prosecution of a physician for contraceptive treatment of a minor without parental consent, though present attempts by various parent groups to recover for such unauthorized treatment[46] would indicate that a physician's fear of liability is not completely without basis.

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[39]"A person of full capacity who freely and without fraud or mistake manifests to another assent to the conduct of the other is not entitled to maintain an action of tort for harm resulting from such conduct." RESTATEMENT OF TORTS § 892 (1939).

[40]"[A] surgical operation is a technical battery, regardless of its results, and is excusable only when there is express or implied consent by the patient; . . . the surgeon is liable in damages if the operation is unauthorized." Bonner v. Moran, 126 F.2d 121, 122 (D.C. Cir. 1941).

[41]*See* Rozovsky, *Consent to Treatment*, 11 OSGOODE HALL L.J. 103, 107 (1973).

[42]

> The manifestation of assent by a person so young or so mentally defective that he does not understand the nature or effect of an act done is not a defense to an action for such act. The assent of a parent or guardian or of a person standing in like relation to such a person, however, is a defense to an action by such person, if the parent or guardian had power to require him to submit to the act.

RESTATEMENT OF TORTS § 892, comment *e* (1939). *See* Wadlington, *Minors and Health Care: The Age of Consent*, 11 OSGOODE HALL L.J. 115 (1973).

[43]IND. CODE § 34-1-1-8 (Burns 1973) (parent's action for injury to or death of child).

[44]*See generally* 59 AM. JUR. 2d *Parent and Child* §§ 112, 118 (1971).

[45]*See* Pilpel & Ames, *Legal Obstacles to Freedom of Choice in the Areas of Contraception, Abortion, and Voluntary Sterilization in the United States*, in 6 UNITED STATES COMM'N ON POPULATION GROWTH AND THE AMERICAN FUTURE, RESEARCH REPORTS 55, 62 (C. Westoff & R. Parke, Jr., eds. 1972).

[46]*See, e.g.*, Sarkkinen v. Planned Parenthood Ass'n, Cause No. 74-132 (Starke County Cir. Ct., Ind., venued Mar. 20, 1974).

B. Exceptions to Physicians' Liability

Various common law exceptions to the requirement of parental consent have been recognized to allow a physician to escape the technical battery liability. A physician may provide treatment under circumstances constituting an emergency. If the minor is emancipated, or if the parents are so remote that obtaining their consent is impracticable, the physician may likewise treat the minor.[47] It has also been recognized that the consent of a minor of sufficient age and maturity may be valid if she is able "to understand and comprehend the nature of the . . . procedure, the risks involved and the probability of attaining the desired results in light of the circumstances which attend."[48] This is the so-called "mature minor rule" which removes the minor's incapacity to consent to bodily invasions. Consent to medical treatment by such a minor thus provides a valid defense to technical battery.[49]

In Indiana, as in most states, the age of majority for medical consent purposes is statutory, as are the various exceptions to the incompetency of those below majority. An individual must be at least eighteen to be competent to consent to medical or surgical treatment.[50] If a minor is unmarried and unemancipated, consent must be provided by a parent, by a legal guardian, or by the agency having legal control over the minor.[51] If the minor is emancipated or married,[52] he may consent to medical treatment. Methods of consent otherwise lawful are not excluded by the statutes, and no consent is required in an emergency.[53]

Like Indiana, all jurisdictions except Wisconsin allow individuals below the age of eighteen to consent to treatment for venereal disease.[54] Unlike Indiana, however, twenty-three jurisdictions have extended the consent capacity for contraception to

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[47]Bonner v. Moran, 126 F.2d 121, 122 (D.C. Cir. 1941).

[48]Younts v. St. Francis Hosp. & School of Nursing, Inc., 205 Kan. 292, 300, 469 P.2d 330, 337 (1970).

[49]

> If the child . . . , though under guardianship, is capable of appreciating the nature, extent and consequences of the invasion, his assent prevents the invasion from creating liability, though the assent of the parent, guardian or other person is not obtained or is expressly refused.

RESTATEMENT OF TORTS § 59, comment *a* (1934).

[50]IND. CODE § 16-8-3-1 (Burns 1973).

[51]*Id.* § 16-8-3-1(a).

[52]*Id.* § 16-8-4-1.

[53]*Id.* § 16-8-3-2.

[54]Paul, Pilpel & Wechsler, *Pregnancy, Teenagers and the Law, 1974*, 6 FAMILY PLANNING PERSPECTIVES 142, 143 (1974).

individuals below eighteen,[55] and sixteen jurisdictions currently allow minors to consent to abortion.[56] This effort to deal with the illegitimate pregnancy problem of teenage sexual activity has been accomplished by various devices. Statutes after the Colorado model provide a specified group of individuals, including physicians, clergymen, state agencies, and family planning clinics, who may refer the minor for birth control procedures.[57] Mississippi is illustrative of the few jurisdictions which have both followed the Colorado model for birth control procedures[58] and codified the "mature minor rule."[59] Other approaches have included provisions that a minor has the same capacity to consent as does an adult for certain medical treatment, including contraception and pregnancy-related care,[60] that "any person without regard to age" may give consent to certain treatment,[61] or that consent of the minor shall be sufficient for the purposes of the specified treatment.[62] Several states allow the physician to inform the minor's parents of the treatment without the minor's consent,[63] although this might have the effect of discouraging the minor from seeking necessary treatment. Some states also remove financial responsibility for the treatment from the parents when the minor has provided the consent.[64] Such a provision would be beneficial in states in which minors' contracts are void or voidable, as they are in Indiana.[65]

C. Sources of Contraceptive Policy

These various state efforts to extend to minors the power of consent for sex-related medical treatment have received encouragement from several sources. The United States Commission on Population Growth and the American Future recommended that "states adopt affirmative legislation which will permit minors to receive contraceptive and prophylactic information and services in

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[55]*Id.* Indiana would have achieved this result if Ind. H.R. 1148, 98th Gen. Assembly, 2d Sess. (1974), had passed last term. However, it was defeated by a vote of nineteen to seventy-six on January 17, 1974. *See* 1974 IND. HOUSE J. 187.

[56]Paul, Pilpel & Wechsler, *supra* note 54, at 143.

[57]COLO. REV. STAT. ANN. § 91-1-38 (Supp. 1971). *See also* ILL. ANN. STAT. ch. 91, § 18.7 (Smith-Hurd Supp. 1974); TENN. CODE ANN. § 53-4607 (Supp. 1974).

[58]MISS. CODE ANN. § 41-42-7 (Supp. 1974).

[59]*Id.* § 41-41-3(h) (1973).

[60]MD. ANN. CODE art. 43, § 135(a)(3) (Supp. 1974).

[61]ORE. REV. STAT. § 109.640 (1973).

[62]KY. REV. STAT. ANN. § 214-185(1) (Supp. 1974).

[63]*See, e.g., id.* § 214-185(5).

[64]*Id.* § 214.185(6).

[65]IND. CODE § 29-1-18-41 (Burns 1972).

appropriate settings sensitive to their needs and concerns."[66] The mandatory Medicaid coverage now directs that family planning services and supplies be furnished "to individuals of child bearing age (including minors who can be considered to be sexually active) who are eligible under the State plan and who desire such services and supplies."[67] Congress has also declared, as one purpose of the Family Planning Services and Population Research Act of 1970,[68] its desire "to assist in making comprehensive family planning services readily available to all persons desiring such services,"[69] which impliedly includes minors.[70] Moreover, Congress has provided additional means to improve the availability of contraceptives by amending provisions[71] which had formerly included devices for "preventing conception" as obscene matter which could not be mailed, imported into the United States, or transported in interstate commerce under penalty of criminal sanctions.[72] However, contraceptive availability is nonetheless hindered by provisions that unsolicited contraceptive materials are generally "nonmailable."[73] The American Medical Association, the American College of Obstetricians and Gynecologists, the American Academy of Pediatrics, the American Academy of Family Physicians, the American College Health Association, the Association of Planned Parenthood Physicians, and the American Public Health Association have endorsed the right of physicians to provide contraceptive care for the best interests of their minor patients.[74] The National Association of Children's Hospitals and Related Institutions has endorsed a Medical Bill of Rights for Minors which would allow them to receive medically accepted con-

[66] UNITED STATES COMM'N ON POPULATION GROWTH AND THE AMERICAN FUTURE, POPULATION AND THE AMERICAN FUTURE 100 (C. Westoff & R. Parke, Jr., eds. 1972).

[67] 42 U.S.C. § 1396d (a)(4)(C) (Supp. III, 1973).

[68] 42 U.S.C. § 300 (1970).

[69] *Id.*

[70] *See* P. PIOTROW, WORLD POPULATION CRISIS 230-31 (1973).

[71] 18 U.S.C. §§ 1461-62 (1970), *as amended by* Act of Jan. 8, 1971, Pub. L. No. 91-662, 84 Stat. 1973.

[72] Indiana still has a statute which makes illegal the printing or publishing of an advertisement for drugs or instruments to be used exclusively by females in preventing conception. IND. CODE § 35-1-84-1 (IND. ANN. STAT. § 10-2806, Burns 1956). There is no record of a prosecution under this statute, but an Attorney General opinion construing the statute was provided in 1923. [1923-1924] IND. ATT'Y GEN. REP. 375. However, this statute is of highly questionable constitutional validity. *See* Associated Students for the Univ. v. Attorney General of the United States, 368 F. Supp. 11 (C.D. Cal. 1973).

[73] 39 U.S.C. § 3001(e) (1970). This statute has been criticized as providing "an additional obstacle to freedom of choice in the area of contraception." Pilpel & Ames, *supra* note 45, at 60.

[74] Paul, Pilpel & Wechsler, *supra* note 54, at 144.

traceptive information and devices in doctor-patient confidentiality.[75] Public opinion also apparently favors minor's access to sex-related treatment, as evidenced by a June, 1972, Gallup Poll which revealed that three out of four people agreed with the proposition that "professional birth control information, services and counseling should be made available to unmarried teenagers who are sexually active."[76]

V. Constitutional Rights of Sexually Active Minors

A. In General

The move towards recognition of minors' rights in the area of sexual activity may be supported on constitutional grounds.[77] The courts have already extended various constitutional rights to minors. As stated for the Supreme Court by Justice Fortas, "whatever may be their precise impact, neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."[78] The fourteenth amendment and the Bill of Rights may, however, afford less protection to the interests of minors than to the interests of adults. In juvenile delinquency proceedings, minors have the rights to notice of charges, to counsel, and to confrontation and cross-examination of witnesses, and the privilege against self-incrimination;[79] minors do not, however, have the constitutional right to trial by jury in those proceedings.[80] The Court has encouraged greater limitations on minors' access to possibly obscene materials than upon adults' access by allowing the states to apply a broader definition of obscenity to matters concerning minors[81] and by recognizing "that the States have a legitimate interest in prohibiting dissemination or exhibition of obscene material when the mode of dissemination carries with it a significant danger of . . . exposure to juveniles."[82]

Although high school students have fundamental constitutional rights of speech and expression,[83] school officials may regu-

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[75]3 Family Planning/Population Rep. 72 (1974).

[76]1 Family Planning/Population Rep. 11 (1972).

[77]Note, *Minors and Contraceptives: A Constitutional Issue*, 3 Ecology L.Q. 843 (1973).

[78]In re Gault, 387 U.S. 1, 13 (1967).

[79]In re Gault, 387 U.S. 1 (1967).

[80]McKeiver v. Pennsylvania, 403 U.S. 528 (1971). *Accord*, Bible v. State, 253 Ind. 373, 254 N.E.2d 319 (1970). *But see* 3 Ind. Legal F. 547 (1970) (criticizing the rule).

[81]Ginsberg v. New York, 390 U.S. 629 (1968).

[82]Miller v. California, 413 U.S. 15, 18-19 (1973). *See also* Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973).

[83]Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 506 (1969).

late those rights upon "a specific showing of constitutionally valid reasons" for doing so.[84] Students facing temporary suspension from public schools are entitled to due process protection in the form of notice of charges and an opportunity for hearing,[85] but students "whose presence poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process may be immediately removed from school."[86] Federal courts are split on the question of whether high school dress codes against long hair violate a student's constitutional rights.[87] Although at least one district court would allow students to "have the same rights and enjoy the same privileges [under the Constitution] as adults,"[88] the Supreme Court has declined to settle the area.[89]

The United States District Court for the Eastern District of Pennsylvania ostensibly recognized a fundamental right of privacy in students[90] but may have been more concerned with protecting the privacy of the relationship between parent and child.[91] This concern is indicative of the judicial attitude which has discouraged more rapid extension of constitutional rights to minors. The Supreme Court has recognized that "the custody, care and nurture of the child reside first in the parents,"[92] and that there is a "private realm of family life which the state cannot enter."[93] However, the state as parens patriae "has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare . . . ."[94]

The constitutional rights of the child may more properly be viewed as a balance struck between the parents' rights of control and the state's power over public welfare. The minor as an individual has few constitutional rights which preponderate against both the state and his parents. For example, the due process rights of minors in delinquency proceedings are designed to protect the rights of parents as well,[95] and the right of expression granted minors is apparently not intended to conflict with the interests of

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[84]*Id.* at 511.

[85]Goss v. Lopez, 95 S. Ct. 729 (1975).

[86]*Id.* at 740.

[87]*Compare* Breen v. Kahl, 419 F.2d 1034 (7th Cir. 1969), *and* Richards v. Thurston, 424 F.2d 1281 (1st Cir. 1970), *with* Ferrell v. Dallas Independent School Dist., 392 F.2d 697 (5th Cir. 1968), *and* Jackson v. Dorrier, 424 F.2d 213 (6th Cir. 1970).

[88]Miller v. Gillis, 315 F. Supp. 94, 99 (N.D. Ill. 1969).

[89]Olff v. East Side Union High School Dist., 445 F.2d 932 (9th Cir. 1971), *cert. denied,* 404 U.S. 1042 (1972) (Douglas, J., dissenting).

[90]Merriken v. Cressman, 364 F. Supp. 913 (E.D. Pa. 1973).

[91]*Id.* at 918.

[92]Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

[93]*Id.*

[94]*Id.* at 167.

[95]In re Gault, 387 U.S. 1, 33-34 (1967).

parents.[96] Parents have a genuine and valid interest in the activities of their children which is generally necessary to the performance of their parental obligations. However, there is increasing recognition that the privacy rights of minors are equivalent to those of adults in the related areas of contraception and abortion and deserve like constitutional protection.

B. Contraception

The Supreme Court has not yet recognized the constitutional right of minors to receive contraceptive or abortion treatment. This non-recognition is a product of the relatively recent development of such constitutional rights in adults. The right to contraception was not affirmatively upheld for married couples until 1965 when the Court, in *Griswold v. Connecticut,*[97] extended the right of privacy penumbrae of the Bill of Rights and the fourteenth amendment[98] to protect the use of contraceptives in the marital relationship.[99] Seven years after *Griswold,* the Court further extended this privacy right to unmarried adults in *Eisenstadt v. Baird.*[100] The Court, per Justice Brennan, found that different treatment for married and unmarried individuals could not be justified constitutionally; the Massachusetts statute which provided unequal treatment was therefore violative of the equal protection clause of the fourteenth amendment.[101] The statute had made unlawful the delivery of any drug or article for the prevention of contraception except by a registered pharmacist to married people. The statute was defended as a legitimate effort under the state's police powers to protect health. The First Circuit had rejected this argument because it could find no difference between the medical skills necessary to treat unmarried or married individuals,[102] and because the state had "made no attempt to distinguish . . . between dangerous or possibly dangerous articles, and those which are medically harmless."[103] The First Circuit had also rejected the arguments that the statute was a valid attempt to protect morals[104] and that it was intended to discourage

[96]Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 504 (1969) (students and their parents had agreed to the expressive conduct).

[97]381 U.S. 479 (1965).

[98]*Id.* at 484.

[99]Just four years prior to the *Griswold* decision, the Court had failed to find such a right. Poe v. Ullman, 367 U.S. 497 (1961).

[100]405 U.S. 438 (1972).

[101]*Id.* at 443.

[102]Baird v. Eisenstadt, 429 F.2d 1398, 1401 (1st Cir. 1970).

[103]*Id.*

[104]

> To say that contraceptives are immoral as such, and are to be

fornication.[105] The Supreme Court affirmed the First Circuit's ruling against the anti-fornication[106] and health[107] justifications for the statute but did not reach, as the First Circuit did, the question of whether the statute interfered with fundamental human rights, "because, whatever the rights of the individual to access to contraceptives may be, the right must be the same for the unmarried and the married alike."[108]

Though the *Eisenstadt* case concerned the delivery of a contraceptive device by a non-druggist to an unmarried adult woman, the Court's language could reasonably be taken to extend the privacy-based contraceptive right to minors. Justice Brennan did not discourage this inference when he stated: "If the right of privacy means anything, it is the right of the *individual,* married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[109] However, efforts to gain an extension of these rights to minors have met with mixed success. The Utah Supreme Court rejected an equal protection or privacy basis for such a right.[110] More recently, the United States District Court for the Southern District of New York determined that a statute prohibiting sale of nonprescription contraceptives to persons under sixteen raised "a not insubstantial question . . . as to whether this provision unconstitutionally infringes the right to

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forbidden to unmarried persons who will nevertheless persist in having intercourse, means that such persons must risk for themselves an unwanted pregnancy, for the child, illegitimacy, and for society, a possible obligation of support. Such a view of morality is not only the very mirror image of sensible legislation; we consider that it conflicts with fundamental human rights. In the absence of a demonstrated harm, we hold it is beyond the competency of the state.

Id. at 1402.

[105] [I]f the legislature is truly concerned with deterring fornication, it may increase the statutory penalty to mark the measure of its concern. It may not do so, however, by making the penalty a personally, and socially, undesired pregnancy.

Id.

[106] 405 U.S. at 449-50.

[107] *Id.* at 451. The Court noted that, although the appellant insisted that the unmarried have no right to engage in sexual intercourse and thus no health interest to be served in contraception, devices were available without controls so long as their purpose was the prevention of disease. "It is inconceivable that the need for health controls varies with the purpose for which the contraceptive is to be used when the physical act in all cases is one and the same." *Id.* at 451 n.8.

[108] *Id.* at 453.

[109] *Id.* (emphasis in original).

[110] Doe v. Planned Parenthood Ass'n, 29 Utah 2d 356, 510 P.2d 75, *cert. denied,* 414 U.S. 805 (1973).

privacy of [those] under the age of sixteen"[111] and therefore granted a motion to convene a three-judge district court on the question.[112] If the three-judge district court establishes that such a constitutional right does not exist for minors, the language of *Eisenstadt* will clearly be applicable to minors as well as to adults.

C. Abortion

In 1973, the Supreme Court, in *Roe v. Wade*[113] and *Doe v. Bolton*,[114] further extended the fundamental privacy right to include abortion and established that the decision to terminate pregnancy should lie exclusively with the woman and her physician during the first trimester without state interference.[115] It has been argued that the privacy interests of a minor woman should also be compelling in the first trimester, and that the state should not place added restrictions upon minors seeking abortions,[116] but the Court expressly declined to rule on the constitutionality of state statutes requiring parental consent for abortions on unmarried minors.[117]

The Washington Supreme Court recently determined that an unmarried minor woman has the same right of privacy as does an adult woman in the abortion decision, and that a state statute which required parental consent for abortion upon a minor woman offended the equal protection clause of the fourteenth amendment.[118] A three-judge district court has also found the requirement of parental consent unconstitutional.[119] Such state and district court action should encourage the removal of the statutory parental consent requirement such as the one found in Indiana.[120] More importantly, this increasing trend toward a recognition of constitutional rights in minors should result in a final determination by the Supreme Court that the Constitution protects the use of contraceptives by minors.

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[111]Population Services Int'l v. Wilson, 383 F. Supp. 543, 549 (S.D.N.Y. 1974).

[112]*Id.* at 550.

[113]410 U.S. 113 (1973).

[114]410 U.S. 179 (1973).

[115]410 U.S. at 163.

[116]*See, e.g.*, Note, *The Minor's Right to Abortion and the Requirement of Parental Consent*, 60 VA. L. REV. 305 (1974).

[117]410 U.S. at 165 n.67.

[118]State v. Koome, 530 P.2d 260 (Wash. 1975). The court also suggested that "[t]he age of fertility provides a practical minimum age requirement for consent to abortion, reducing the need for a legal one." *Id.* at 267.

[119]Coe v. Gerstein, 376 F. Supp. 695 (S.D. Fla. 1973), *appeal dismissed*, 417 U.S. 279 (1974).

[120]IND. CODE § 35-1-58.5-2 (a) (2) (IND. ANN. STAT. § 10-108, Burns Supp. 1974).

VI. Conclusion

The need for prompt action, as demonstrated by the incidence of teenage pregnancy, would suggest that a statute allowing minors to consent to contraceptive treatment, similar to the statute allowing consent to treatment of venereal disease, is in order. It might be argued that such a move would be to condone premarital sexual intercourse, but it could more reasonably be viewed as an attempt to discourage premarital conception. The decision to become sexually active does not depend upon the availability of contraceptives—as is indicated by the teenage pregnancy statistics. Perhaps more importantly, many sexually active young women do not use even nonprescription contraceptive methods, or do so only infrequently,[121] raising the need for accurate and widespread dissemination of information, supported actively by the state. In view of the state's interests in protecting the rights of minor individuals and in solving the problems resulting directly from teenage sexual activity, a statutory effort which would place the contraception decision in the physician and his patient, while eliminating extraordinary liabilities, is justified and highly desirable.

Bruce A. Walker

[121] *See* Zelnik & Kanter, *Sexuality, Contraception and Pregnancy Among Young Unwed Females in the United States*, in 1 United States Comm'n on Population Growth and the American Future, Research Reports 355, 366 (C. Westoff & R. Parke, Jr., eds. 1972).

Recent Developments

Decedents' Estates—DESCENT AND DISTRIBUTION STATUTES—Statute allowing inheritance by illegitimate children through the mother but silent on inheritance through the father held invidious discrimination under the equal protection clause of the fourteenth amendment.—*Green v. Woodard*, 318 N.E.2d 397 (Ohio Ct. App. 1974).

Leslie Green[1] alleged she was entitled to real estate as the natural daughter of Liston Thomas or alternatively as the stepdaughter of Emmaline Thomas. Liston Thomas died intestate May 11, 1971, and his wife Emmaline died intestate September 7, 1971. In the interim, the real estate was deeded to Elijah Woodard by Emmaline Thomas, who Leslie Green claimed was incompetent, comatose, and lacking in capacity to execute the deed. Elijah Woodard answered that Leslie Green did not have standing to bring this action because she was not related to Liston Thomas so as to bring her within the word "child" of the Ohio descent and distribution statutes.[2] The trial court granted defendant's motion for summary judgment and an appeal resulted.[3]

[1]The plaintiff Leslie Green was born on February 3, 1937; her birth certificate read "Leslie Louise Haddie Mae Dingle." No one was listed as her father because her mother was not married at the time of her birth. Her mother never married the alleged father, Liston Thomas, but her mother did marry a man named Royal at a later date. The plaintiff claimed she was baptized Lessie Mae Thomas ten years after her birth, but she did not present the baptism certificate. Green v. Woodard, 318 N.E.2d 397, 408 (Ohio Ct. App. 1974). Although the opinion does not so state, it is inferred that the plaintiff subsequently married a man by the name of Green.

[2]The plaintiff's claims were based on an interpretation of the words "child" or "children" in OHIO REV. CODE ANN. § 2105.06 (1968), the general statute of descent and distribution, to include both legitimate and illegitimate children. The same interpretation was sought of the half-and-half statute, *id.* § 2105.10, which provides for inheritance by a stepdaughter:

> When a relict of a deceased husband or wife dies intestate and without issue, possessed of identical real estate or personal property which came to such relict from any deceased spouse by deed of gift, devise, bequest, descent, or by an election to take under the revised Code, such estate, real and personal, except one half thereof which shall pass to and vest in the surviving spouse of such relict, shall pass to and vest in the children of the deceased spouse from whom such real estate or personal property came, or their lineal descendants, per stirpes.

The term descent and distribution statutes is used throughout the text to refer to both the above Ohio statutes.

[3]Green v. Woodard, 318 N.E.2d 397, 400 (Ohio Ct. App. 1974).

Leslie Green was unable to show on appeal that she was, in fact, a child of Liston Thomas, and she was not, therefore, entitled to any share of his property.[4] The Court of Appeals of Ohio, however, used the opportunity to hold that the words "child" and "children" contained in the descent and distribution statutes include all illegitimate children and not just those illegitimate children who take from and through the mother under the statute dealing with inheritance by illegitimate children.[5]

The Ohio statute[6] provided that an illegitimate child can inherit from and through its mother as if born in lawful wedlock but said nothing about inheritance from the father. The Court of Appeals of Ohio held in *Green v. Woodard*[7] that such classification was not discrimination between legitimates and illegitimates,[8] but was discrimination between illegitimate children who inherit from and through their mothers and those illegitimate children who were prohibited from inheriting from and through their fathers.[9] This intra-class discrimination, the *Green* court

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[4] *Id.* at 408.

[5] The Ohio statute, OHIO REV. CODE ANN. § 2105.17 (1968), provides:

> Bastards shall be capable of inheriting or transmitting inheritance from and to the mother, and from and to those from whom she may inherit or to whom she may transmit inheritance, as if born in lawful wedlock.

For comparative legislation see note 36 *infra*.

[6] OHIO REV. CODE ANN. § 2105.17 (1968). The terms "bastard" and "illegitimate" were used interchangeably in the opinion. Other Ohio statutes provide methods by which an illegitimate child may become, for all practical purposes, legitimate. *Id.* § 3107.13 provides that after adoption the legal relationship between adopting parents and the child is essentially the same as if the child were born to them in lawful wedlock, and *id.* § 2105.18 provides that acknowledgment of the child and marriage to the mother by the putative father will legitimate the child. Such acknowledgment requires a filing in probate court. For a comparison of the Indiana statute, see note 9 *infra*.

[7] 318 N.E.2d 397 (Ohio Ct. App. 1974).

[8] *Id.* at 404. On the basis of Labine v. Vincent, 401 U.S. 532 (1971), it would appear that the court in *Green* felt that discrimination between illegitimate and legitimate children was reasonably related to the state interest the statute was designed to promote. Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972), which dealt with a workmen's compensation statute, was cited by the *Green* court in distinguishing *Labine*, but careful scrutiny of the *Weber* opinion indicates that the Court may have preferred to overrule *Labine*. However, the facts of the *Weber* case did not lend themselves to such a holding because they did not deal directly with descent and distribution statutes.

[9] 318 N.E.2d at 406. Indiana also has set up this intra-class distinction, although the Ohio court in *Green* stated that Indiana treated all illegitimates the same as legitimates. *Id.* at 402. IND. CODE § 29-1-2-7 (Burns 1972) states in part:

> (a) For the purpose of inheritance to, through and from an illegitimate child, such child shall be treated the same as if he were the legitimate child of his mother, so that he and his issue shall inherit

ruled, was not reasonably related to the statutory purpose and could not stand under the equal protection clause of the fourteenth amendment.[10]

The *Green* court recognized the current trend to treat illegitimate children the same as legitimate children.[11] The court found that traditional rationales for discrimination between legitimates and illegitimates were no longer valid.[12] In fact, the court found that application of the rationales had not reduced illegitimate births.[13] These findings significantly detracted from a showing of a reasonable relationship between the statutory purpose and the classification of illegitimate children who can inherit from and through their mothers and those illegitimate children who were prohibited from inheriting from and through their fathers. The court's discussion, therefore, went beyond that necessary to deal with the classification in the Ohio statute and implied that any discrimination against illegitimates, "which punishes innocent children for their parents' transgressions, has no place in our system of government which has as one of its basic tenets equal protection for all."[14] Perhaps the *Green* court wanted to take the larger step—that of declaring any distinction between illegitimates and legitimates for purposes of descent and distribution statutes in-

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from his mother and from his maternal kindred, both descendants and collaterals, in all degrees, and they may inherit from him. Such child shall also be treated the same as if he were a legitimate child of his mother for the purpose of determining homestead rights, and the making of family allowances.

(b) For the purpose of inheritance to, through and from an illegitimate child, such child shall be treated the same as if he were the legitimate child of his father, if but only if, (1) the paternity of such child has been established by law, during the father's lifetime; or (2) if the putative father marries the mother of the child and acknowledges the child to be his own.

[10]318 N.E.2d at 406. See note 29 *infra.*

[11]318 N.E.2d at 402. *Accord,* Estate of Jensen, 162 N.W.2d 861 (N.D. 1968). The *Green* court also referred to a 1965 amendment to the Social Security Act which enlarged the definition of "child" to permit illegitimate children to receive Social Security benefits. 42 U.S.C. § 416(h)(3) (1970). Several decisions have upheld this amendment as not being invidiously discriminatory in violation of the equal protection clause. *E.g.,* Perry v. Richardson, 440 F.2d 677 (6th Cir. 1971); Watts v. Veneman, 334 F. Supp. 482 (D.D.C. 1971), *rev'd in part,* 476 F.2d 529 (D.C. Cir. 1973).

[12]Reasons given in the past for the distinction between legitimates and illegitimates were to preserve feudal tenure, to discourage illegitimate relationships, to avoid artificial presumptions of intent, to encourage legitimate family relationships, and to protect the rights of legitimate children. 318 N.E.2d at 400.

[13]*Id.* The court, however, cited no authority to support this assertion.

[14]Estate of Jensen, 162 N.W.2d 861, 878 (N.D. 1968).

vidious discrimination—but prior United States Supreme Court decisions seem to preclude this.[15]

In *Labine v. Vincent,*[16] the United States Supreme Court upheld Louisiana inheritance statutes which denied an illegitimate child a share with legitimate children in the parents' estates.[17] While on its face the *Labine* decision would appear to be controlling in *Green,* the Court of Appeals of Ohio used the intra-class rationale to distinguish the cases.[18] This distinction is significant because the focus of the rational basis test is changed. In *Labine,* the Court discussed the traditional state interest in intestate succession statutes and concluded that it was within the state's power to make such a distinction so long as an insurmountable barrier to inheritance was not erected.[19] Justice Harlan, in a concurring opinion, attempted to show that Louisiana had a rational basis for the classification since the father could manifest his desire for an illegitimate child to inherit by making a will in which the child was a beneficiary.[20]

Earlier cases alluded to this insurmountable barrier that prevented illegitimates from ever participating as a legitimate.[21] In

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[15]It was the court's own interpretation of prior United States Supreme Court decisions that seemed to preclude such a holding, particularly the court's interpretation of Labine v. Vincent, 401 U.S. 532 (1971). It should be noted at this point, as the *Green* court recognized, that *Labine* was a five to four decision, in which one of the majority wrote a concurring opinion and the dissent attacked the majority for its failure to articulate a rational basis for the difference in treatment. *Id.* at 548.

[16]401 U.S. 532 (1971).

[17]The Court so held even though the child had always used the name Rita Vincent, and the father, Ezra Vincent, had acknowledged her under statutory requirements and had given her a home.

[18]318 N.E.2d at 405.

[19]401 U.S. at 535-36. The majority felt that, since illegitimates could take when there were no other descendants, ascendants, collateral relations or surviving wife, there was no insurmountable barrier. But, as the dissent pointed out, a father who publicly acknowledges his child is not likely to disinherit him. *Id.* at 556. Why should the State make this decision? Has the classification really been shown to be reasonably related to the statutory purpose? The answers to these questions were clear to the Ohio court in *Green,* and the court restrained its decision only in deference to the *Labine* holding.

[20]*Id.* at 540. But does this reasonably relate the classification to the statutory purpose? The dissent maintained that the insurmountable barrier test, taken from Levy v. Louisiana, 391 U.S. 68 (1968), and applied by the majority to find a rational basis in *Labine,* was invalid for this purpose. In fact, there was no insurmountable barrier in *Levy* since the illegitimate child would have been able to recover under the original statutory scheme if the mother had formally acknowledged him.

[21]Gomez v. Perez, 409 U.S. 535 (1973); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972); Glona v. American Guar. & Liab. Ins. Co., 391 U.S. 73 (1968); Levy v. Louisiana, 391 U.S. 68 (1968).

Levy v. Louisiana,[22] a statutory tort action for wrongful death recovery was found not to be a bar to illegitimate children recovering for the wrongful death of their mother, although the statute purportedly authorized such recovery only by legitimate children. In *Labine*, the Court felt that *Levy* could not be fairly read to say that a state may never treat an illegitimate child differently from legitimate offspring.[23]

Therefore, the *Green* court viewed *Labine* as confirmation of a state's power to prohibit, unless certain formalities are met, illegitimate children from sharing as other children under intestate succession statutes.[24] Had the *Green* court closely examined the justices' positions in *Weber v. Aetna Casualty & Surety Co.*,[25] together with the *Labine* dissent, it might have concluded that the United States Supreme Court was dissatisfied with the equal protection analysis in *Labine* and would not reach the same conclusion again.[26] In *Green*, however, the Ohio statute did not discriminate between illegitimates and legitimates as the Louisiana statute in *Labine* did.[27] An entirely separate classification was under attack in *Green*. A distinction in statutory schemes existed. Louisiana did not treat any illegitimate children the same as legitimate children, but Ohio treated some illegitimates the same by allowing them to inherit through their mothers but not their fathers.[28] This intra-class distinction in the Ohio statute was the invidious discrimination.

The *Green* court dealt with several arguments that attempted to establish a reasonable relationship between the classification and the statutory purpose.[29] Action or inaction of the father as

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[22]391 U.S. 68 (1968). The Supreme Court held that, since legitimacy or illegitimacy of birth has no rational relationship to the nature of the wrong allegedly inflicted upon the mother, the statute constituted an invidious discrimination against the children. See discussion of the *Levy* dissent in note 20 *supra*.

[23]401 U.S. at 536.

[24]The intra-class distinction present in the Ohio statute allowed the appellant to avoid the problem of dealing directly with the *Labine* decision.

[25]406 U.S. 164 (1972).

[26]See the discussion in notes 20 *supra* and 29 *infra*.

[27]The Ohio statute is set out in note 5 *supra*.

[28]318 N.E.2d at 405.

[29]Traditionally, there are two tests used by the Court in interpreting legislation challenged under the equal protection clause of the fourteenth amendment. The test utilized depends on the interest involved. Historically, the rational basis test has been used in the areas of economic and social regulation. This test holds a statute valid if the classification is reasonably related to the statutory purpose of furthering a legitimate state interest. The second test, the compelling state interest test, is used when statutes affect fundamental rights or when suspect classifications exist. The statutes are not afforded a presumption of constitutionality, as they are under the rational basis test, but

it affected legitimate or illegitimate children was not a consideration of the court.[30] Further, the composite reasoning of prior cases was rejected: (1) that the devolution of property within a state rests within the discretion of the state,[31] (2) that illegitimate children are not completely discriminated against because they may be recognized and left property by will or be legitimated by adoption or acknowledgment,[32] (3) that proof of paternity is difficult,[33] and (4) that spurious and fraudulent claims may be brought.[34] The court recognized that under close examination these arguments were really not directed at the factual nexus betwen the classification and the statutory purpose.[35]

The proof marshalled by the *Green* court was beyond that necessary to show that the intra-class distinction made by the Ohio statute was invidious discrimination. The *Green* court suggested that, were it not for its interpretation of *Labine* and related case law, it was ready to hold that any classification of children as illegitimates and legitimates was not reasonably related to the state's interest and statutory purpose in descent and distribution laws. The *Green* decision, together with the *Weber* opinion and the *Labine* dissent, indicates that more courts are likely to find that statutes which allow illegitimate children to in-

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the burden of proving a compelling state interest is on the person asserting the validity of the statute—a burden that is rarely carried. Balancing the individual interest against the state purpose is the major distinction of the compelling state interest test. Several recent United States Supreme Court decisions have indicated that factors of both tests are being considered—a hybrid approach. This approach was used in *Weber*, which is often cited as holding that illegitimacy is a suspect classification because of the discussion of the compelling state interest test and Justice Blackmun's concurring opinion. *See* 406 U.S. at 176. For a thorough discussion of the hybrid approach, see Gunther, *The Supreme Court, 1971 Term—Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972). For an excellent discussion of equal protection doctrines in a case analysis, see Stroud, *Sex Discrimination in High School Athletics*, 6 IND. L. REV. 661 (1973).

[30]318 N.E.2d at 406.

[31]Labine v. Vincent, 401 U.S. 532 (1971); Strahan v. Strahan, 304 F. Supp. 40 (W.D. La. 1969), *cert. denied*, 404 U.S. 949 (1971); Watts v. Veneman, 334 F. Supp. 482 (D.D.C. 1971), *rev'd in part*, 476 F.2d 529 (D.C. Cir. 1973).

[32]Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972); Labine v. Vincent, 401 U.S. 532 (1971).

[33]Miller v. Laird, 349 F. Supp. 1034 (D.D.C. 1972); Estate of Pakarinen, 287 Minn. 321, 178 N.W.2d 714 (1970) (decided prior to the 1971 amendment of MINN. STAT. ANN. § 525.172 (1969)); Blackwell v. Bowman, 150 Ohio St. 34, 80 N.E.2d 493 (1948).

[34]Beaty v. Weinberg, 478 F.2d 300 (5th Cir. 1973); Jiminez v. Richardson, 353 F. Supp. 1356 (N.D. Ill. 1973); Schmoll v. Creecy, 54 N.J. 194, 254 A.2d 525 (1969).

[35]318 N.E.2d at 406.

herit from and through their mothers but prohibit illegitimate children from inheriting from and through their fathers are in violation of the equal protection clause of the fourteenth amendment.[36]

BRUCE HEWETSON

Criminal Procedure—SEARCH WARRANTS—Erroneous statements made by federal agent in affidavit for search warrant were immaterial and did not authorize suppression of evidence.—*United States v. Marihart,* 492 F.2d 897 (8th Cir.), *cert. denied,* 419 U.S. 827 (1974).

The United States Supreme Court's denial of certiorari in *United States v. Marihart*[1] left unresolved the crucial question of what standard is to be applied in scrutinizing affidavits which support the issuance of warrants and allegedly contain false statements. Defendants James Marihart, Edwin Kensley, and Michael Guerra were jointly charged, in a four count indictment[2] returned on March 22, 1972, with possessing firearms in violation of 18 U.S.C. § 1202(a)(1)(App.).[3] The indictment and arrest of the

[36]The Indiana statute creates an intra-class distinction similiar to that invalidated in *Green.* An illegitimate child who would not take an intestate share of his natural father's estate under present Indiana law may wish to challenge the Indiana statute in the same manner as the plaintiff did in *Green.* At least two major problems will be encountered. First, the Indiana statute allows illegitimate children to inherit from and through their fathers if paternity is established by law during the father's lifetime. See IND. CODE § 29-1-2-7 (Burns 1972) set out at note 9 *supra.* The Ohio statute has no such provision, and a good argument can be made that the requirement of establishing paternity during the father's lifetime provides a rational basis for the statutory classification. Secondly, even if the Indiana statute were declared invalid, the child should be prepared to prove convincingly that he is, in fact, the illegitimate child of the alleged father. Failure to do so precluded recovery in *Green.*

Similar challenges may arise in states with comparable legislation. *See* ILL. REV. STAT. ch. 3, § 12 (1973); KY. REV. STAT. ANN. § 391.090 (1972); MASS. GEN. LAWS ANN. ch. 190, § 5 (1969); MICH. STAT. ANN. § 27.3178 (151) (1962); N.Y. EST. POWERS & TRUSTS LAW § 4-1.2 (1967); PA. STAT. ANN. tit. 20, § 2107 (Spec. Pamphlet 1972); TENN. CODE ANN. § 31-105 (1955); W. VA. CODE ANN. § 42-1-5 (1966).

[1]492 F.2d 897 (8th Cir.), *cert. denied,* 419 U.S. 827 (1974).

[2]"Each count charge[d] possession on October 20, 1971, of a different firearm, and also allege[d] all of the defendants had previously been convicted of a felony." United States v. Marihart, 472 F.2d 809, 810 n.1 (8th Cir. 1972) (hearing on probable cause issue).

[3]18 U.S.C. § 1202(a)(1)(Appendix 1970) provides in pertinent part:

(a) Any person who—

(1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony . . .

. . .

defendants were occasioned by the burglarization of the residence and firearm dealership of George Lorenger on October 16, 1971.[4] On the following day, F.B.I. Special Agent Oxler received information that the defendants might be involved in the burglary and were driving a blue Ford station wagon. A vehicle matching the description given Oxler was sighted on October 20 in Sioux City, Iowa. The occupants of the vehicle pulled up to a residence and removed, with difficulty, a large pasteboard box.[5] Local police officers were summoned to maintain surveillance of the premises while Detective Captain Frank O'Keefe, of the Sioux City Police Department, obtained a search warrant; the warrant application was supported by O'Keefe's affidavit and oral testimony given under oath before the issuing magistrate.[6] Upon O'Keefe's return with a warrant, he and the officers broke into the residence, which was vacant, and found several rifles and shotguns; included among these were the weapons specified in the indictment.

On April 14, 1972, the defendants filed a joint motion to suppress the firearms described in the indictment.[7] The motion to suppress was granted by the trial court, but on appeal that order was vacated and the cause remanded pursuant to an en banc finding that "probable cause" had been established.[8] How-

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and who receives, possesses, or transports in commerce, after the date of the enactment of this Act, any firearm shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

[4]"Lorenger sold guns in Iowa, Nebraska, South Dakota and California. The four firearms which comprise[d] the four counts of the indictment had been purchased from a dealer in Faribault, Minnesota." 492 F.2d at 898. These facts were sufficient to establish the propriety of F.B.I. involvement in this case.

[5]The affidavit stated in part:

This blox [sic] is believed to contain some of the firearms which were stolen from the residence of GEORGE LORENGER on 10-16-71. MR. OXLER stated that these three men had difficulty carrying the box into the residence at 1807 Jackson.

472 F.2d at 810 n.2. The fact that the box was removed with difficulty seemed to be significant in establishing probable cause for the warrant.

[6]O'Keefe was able to obtain a warrant based on the information supplied by Special Agent Oxler and others. See *id.* (text of the affidavit) and *id.* at 810-11 (summary of the accompanying testimony).

[7]The motion was filed on the grounds

that the weapons were obtained as the result of an illegal search and seizure in violation of the Fourth Amendment to the United States Constitution and because the information presented to the magistrate who issued the search warrant did not sufficiently delineate the "informant's" source of knowledge as required by Spinelli v. United States, 393 U.S. 410 . . . (1969).

472 F.2d at 810.

[8]472 F.2d at 815.

ever, at trial, the court granted a hearing on the defendants' renewed motion to suppress.[9] An in camera hearing was held to examine Captain O'Keefe's affidavit, his accompanying testimony,[10] and the information known to Special Agent Oxler and others involved in the case. After reviewing the evidence, the trial court denied the defendants' joint motion. Based upon the presentation of this evidence at trial, a verdict of guilty on all four counts was rendered by the jury.

> On appeal the defendants asked the court to scrutinize again the affidavit and the oral testimony and redetermine the "probable cause" issue in light of evidence adduced at the trial which the defendants allege[d] raise[d] some question as to the accuracy of the information supplied to the issuing magistrate.[11]

In opposition to the appeal, the government argued that the appellants could not impeach the search warrant and the accompanying affidavit since no bad faith or other such circumstances had been shown in the suppression hearing held prior to trial.[12]

The Eighth Circuit Court of Appeals was faced with the issue of whether false or inaccurate statements in an affidavit, facially sufficient to establish probable cause, would vitiate a warrant and compel suppression of the subsequently seized evidence. Since the trial court had allowed Marihart and the other defendants to question the truthfulness of the affidavit, the appellate court was not faced with the issue of whether a defendant may make such an attack.[13] The court did note that under "ap-

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[9]This renewed motion concerned the issue of whether inaccuracies or misrepresentations in an affidavit by a police official vitiate a search warrant issued pursuant thereto.

[10]Affiant, Captain O'Keefe, was not called in connection with this renewed motion. 492 F.2d at 899 n.2.

[11]*Id.* at 898.

[12]

> The government contends that since there was no initial showing of wilful misrepresentation or bad faith on the part of the affiant, the affidavit (and testimony) in support of the application for the search warrant was not subject to impeachment. Further, that since the trial court did permit appellants during the course of the trial to make inquiry into the accuracy of the affiant, and an examination of the record discloses no material discrepancies, appellants' claim is without merit.

Id. at 898-99.

[13]492 F.2d at 899. The Supreme Court in Rugendorf v. United States, 376 U.S. 528 (1964), evaded this issue:

> This Court has never passed directly on the extent to which a court may permit such an examination when the search warrant is valid on its face and when the allegations of the underlying affidavit establish "probable cause"; however, assuming, for the purpose of

propriate circumstances such an inquiry may be made."[14] Thus, the trial court made possible the hurdling of an obstacle which remains in many jurisdictions and often precludes this kind of attack.[15]

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this decision, that such an attack may be made, we are of the opinion that the search warrant here is valid.

Id. at 531-32.

[14]492 F.2d at 899. The court cited the following cases as authority: Hunt v. Swenson, 466 F.2d 863 (8th Cir. 1972); United States v. Bridges, 419 F.2d 963 (8th Cir. 1969); Lowery v. United States, 161 F.2d 30 (8th Cir. 1943). The court noted further:

> At least two circuits have indicated that such a hearing should be held "when there has been an initial showing of falsehood or other imposition on the magistrate." United States v. Dunnings, 425 F.2d 836, 840 [2nd Cir. 1969]; United States v. Rael, 467 F.2d 333 [10th Cir. 1972].

492 F.2d at 899 n.2.

[15]Though beyond the scope of this Recent Development, this issue of whether or not the truth of statements in an affidavit or warrant can be attacked is still a very viable one. Early federal decisions held that the truthfulness of an affidavit or warrant could not be attacked. *See* Kenny v. United States, 157 F.2d 442 (D.C. Cir. 1946); United States v. Brunette, 53 F.2d 219 (W.D. Mo. 1931); United States v. McKay, 2 F.2d 257 (D. Nev. 1924). Some recent decisions also seem to follow the reasoning of these early cases but are now in a minority. *See, e.g.*, United States v. Wong, 470 F.2d 129 (9th Cir. 1972); United States v. Bowling, 351 F.2d 236 (6th Cir.), *cert. denied*, 383 U.S. 908 (1965).

Today, the trend at the federal level clearly is to allow an attack on the veracity of an affidavit or warrant. *See* United States v. Carmichael, 489 F.2d 983 (7th Cir. 1973); United States v. Harwood, 470 F.2d 322 (10th Cir. 1972); United States v. Upshaw, 448 F.2d 1218 (5th Cir. 1971); United States v. Ramos, 380 F.2d 717 (2nd Cir. 1967); Jackson v. United States, 336 F.2d 579 (D.C. Cir. 1964); King v. United States, 282 F.2d 398 (4th Cir. 1960) (dicta).

The majority of state jurisdictions refuse to allow an attack on the truthfulness of statements in an affidavit or warrant. *See* People v. Stansberry, 47 Ill. 2d 541, 268 N.E.2d 431 (1971); State v. Lamb, 209 Kan. 453, 497 P.2d 275 (1972); State v. Anselmo, 260 La. 306, 256 So. 2d 98 (1971), *cert. denied*, 407 U.S. 911 (1972); State v. Petillo, 61 N.J. 165, 293 A.2d 649 (1972), *cert. denied*, 410 U.S. 945 (1973); Poole v. State, 467 S.W.2d 826 (Tenn. Crim. 1971).

Only a minority of decisions at the state level have found reason to allow an attack on the veracity of statements in a warrant or affidavit. *See* People v. Nelson, 171 Cal. App. 2d 356, 340 P.2d 718 (1959); People v. Irizarry, 64 Misc. 2d 49, 314 N.Y.S.2d 384 (N.Y. County Crim. Ct. 1970); People v. Alfinito, 16 N.Y.2d 181, 211 N.E.2d 644, 264 N.Y.S.2d 243 (1965).

A number of sources have discussed this issue and only a few have found any justification for denying the defendant the right to delve below the surface of an affidavit or warrant when the veracity is in question. *See, e.g.*, Forkosh, *The Constitutional Right to Challenge the Content of Affidavits in Warrants Issued Under the Fourth Amendment*, 34 OHIO ST. L. REV. 297 (1973); Grano, *A Dilemma for Defense Counsel:* Spinelli-Harris *Search War-*

Serious problems arose when the court permitted the defendants to attack the affidavit which allegedly contained false statements: (1) what standard would the court use to determine the validity of the affidavit if it were found to contain false statements, and (2) at what point would the court find "probable cause" lacking after applying this standard? In tackling these questions, the *Marihart* court considered two recent cases from the Fifth and Seventh Circuits.[16] These two decisions established definitive guidelines applicable to the solution of the issue confronting the *Marihart* court.

The first of these cases, *United States v. Carmichael*,[17] involved an arrest of defendant Carmichael for possession of checks, known to have been stolen in the mail, in violation of 18 U.S.C. § 1708.[18] He was arrested pursuant to a warrant issued on the complaint of Secret Service Agent Eugene Hussey. The affidavit supporting the warrant stated that a reliable informant, whose information in the past had led to the conviction of at least six persons, had conveyed information that the defendant had a number of stolen checks in his possession.[19] Agent Hussey arrested Carmichael on February 10, 1969, while Carmichael was sitting in his car waiting for the return of another suspect. A search of Carmichael's car uncovered thirty-one checks in an envelope under the carpeting of the car. The defendant, prior to trial, moved to suppress this evidence obtained following his arrest; at the suppression hearing, his motion was denied after the trial court refused to allow his attorney to cross-examine Hussey to determine the veracity of the affiant's statements. The defendant was convicted in federal court based on this evidence seized pursuant to the allegedly ill-supported warrant.

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rants and the Possibility of Police Perjury, 1971 U. ILL. L.F. 405. Kipperman, *Inaccurate Search Warrant Affidavits as a Ground for Suppressing Evidence*, 84 HARV. L. REV. 825 (1971); Mascolo, *Impeaching the Credibility of Affidavits for Search Warrants: Piercing the Presumption of Validity*, 44 CONN. B.J. 9 (1970). Comment, *Controverting Probable Cause in Facially Sufficient Affidavits*, 63 J. CRIM. L.C. & P.S. 41 (1972).

[16]United States v. Carmichael, 489 F.2d 983 (7th Cir. 1973); United States v. Thomas, 489 F.2d 664 (5th Cir. 1973).

[17]489 F.2d 983 (7th Cir. 1973).

[18]18 U.S.C. § 1708 (1970) provides in pertinent part:

> Whoever buys, receives, or conceals, or unlawfully has in his possession, any letter, postal card, package, bag, or mail, or any article or thing contained therein, which has been so stolen, taken, embezzled, or abstracted . . .
>
> Shall be fined not more than $2,000 or imprisoned not more than five years, or both.

[19]For the summary of the statements contained in the affidavit, see 489 F.2d at 894.

On appeal, the Seventh Circuit first held that the trial court erred in not allowing an inquiry into the truthfulness of statements in the affidavit;[20] the court then delineated the showing necessary to raise such an attack.[21] The opinion set forth stringent standards for the suppression of evidence once a finding had been made that falsehoods were contained in the affidavit.[22] The court explicitly held that evidence should not be suppressed unless the officer was at least reckless in his misrepresentation; a completely innocent misrepresentation is insufficient to justify suppression.[23] Further, there was a finding that negligent misrepresentations would not constitute a sufficient ground for exclusion of evidence since "no workable test suggests itself for determining whether an officer was negligent or completely innocent in not checking his facts further."[24] This language leads to the conclusion that innocent or negligent misstatements in an affidavit, even if material to the establishment of probable cause, would not necessitate the exclusion of evidence seized under authority of a warrant based on these errors.

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[20]The Seventh Circuit, in United States v. Pearce, 275 F.2d 318, 321 (1960), had earlier expressed its opinion in dicta that the propriety of such a hearing "is hardly open to question."

[21]

> We now hold that a defendant is entitled to a hearing which delves below the surface of a facially sufficient affidavit if he made an initial showing of either of the following: (1) any misrepresentation by the government agent of a material fact, or (2) an intentional misrepresentation by the government agent, whether or not material.

489 F.2d at 988 (citation omitted).

[22]*Id.* at 988-89.

[23]

> A completely innocent misrepresentation is not sufficient for two reasons. Most importantly, the primary justification for the exclusionary rule is to deter police misconduct . . . and good faith errors cannot be deterred. Furthermore, such errors do not negate probable cause. If an agent reasonably believes facts which on their face indicate that a crime has probably been committed, then even if mistaken, he has probable cause to believe that a crime has been committed. Such errors are likelier and more tolerable during the early stages of the criminal process, for issuance of a warrant is not equivalent to conviction.

Id.

[24]The court noted that negligent misrepresentations are conceivably deterable by suppression of the evidence but concluded

> that evidence should not be suppressed unless the officer was at least reckless in his misrepresentation. Even where the officer is reckless, if the misrepresentation is immaterial, it did not affect the issuance of the warrant and there is no justification for suppressing the evidence . . . .

Id. at 989.

The second case considered by the *Marihart* court, *United States v. Thomas*,[25] involved a conviction for the possession of 128.46 grams of heroin, a Schedule I narcotic drug substance, in violation of 21 U.S.C. § 841(a)(1).[26] Agent Phillips of the Bureau of Narcotics and Dangerous Drugs was able to procure a search warrant based on his affidavit.[27] A later search under authority of the warrant produced fruitful evidence to be used against Thomas. The defendant moved, prior to trial, to suppress the evidence because of errors in the affidavit upon which the search warrant was based; the trial court found that the errors were made in good faith and were insignificant to the magistrate's finding of probable cause. Thomas was convicted and appealed on several grounds,[28] but the United States Court of Appeals for the Fifth Circuit found a substantial question only in regard to the standards for evaluating affidavits containing misrepresentations.[29]

The approach adopted by the Fifth Circuit in earlier cases entails, once false statements in an affidavit have been exposed, expunging the false material before approaching the probable cause issue.[30] After accordingly deleting the erroneous statements, the *Thomas* court found that there remained facts which might have supported a magistrate's finding of probable cause.[31] The crucial question then became whether the court should test the residue of facts to determine only the probable cause issue, or whether it should also determine the overall effect of the inclusion of false statements in the affidavit. The court concluded that, even though probable cause might remain facially after an excision of the erroneous material, the affidavit would be invalid if the error

> (1) was committed with an intent to deceive the magistrate, whether or not the error is material to the show-

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[25]489 F.2d 664 (5th Cir. 1973).

[26]21 U.S.C. § 841(a)(1) (1970).

[27]489 F.2d at 665-66.

[28]The issues raised by Thomas were (1) that the admitted misrepresentations in the affidavit by Agent Phillips should vitiate the search warrant, (2) that the search conducted at night was illegal, and (3) that the arrest and search incident thereto were invalid.

[29]This case did not present the issue of whether or not an attack could be made on the factual validity of the affidavit; therefore, this remains a continuing issue in the Fifth Circuit. *See* United States v. Morris, 477 F.2d 657 (5th Cir. 1973); United States v. Jones, 475 F.2d 723 (5th Cir. 1973); United States v. Upshaw, 448 F.2d 1218 (5th Cir. 1971).

[30]*See* cases cited at note 29 *supra*.

[31]489 F.2d at 668 (text of statements remaining after deletions had been made).

ing of probable cause; or (2) made non-intentionally, but the erroneous statement is material to the establishment of probable cause.[32]

Several aspects of the Fifth Circuit's approach in *Thomas* are at variance with the position taken by the Seventh Circuit in *Carmichael.* First, the *Thomas* court refused to uphold the validity of an affidavit containing misstatements made "non-intentionally" but which were material to a finding of probable cause;[33] the *Carmichael* court, on the other hand, only excluded statements which were intentionally false or recklessly made but material to the establishment of probable cause.[34] Secondly, the *Thomas* court emphasized that it made no determination of the question of what kind of unintentional misstatements, reckless, negligent, or innocent, would invalidate an affidavit,[35] whereas *Carmichael* explicitly did not allow innocent or negligent misstatements to vitiate an affidavit. The *Thomas* court's reluctance to decide what type of unintentional misstatement might vitiate an affidavit seems to imply that neither innocent nor negligent misstatements would pass muster whatever their materiality. Thirdly, the Fifth Circuit's approach is to exclude all inaccurate misstatements before determining probable cause.[36] If probable cause remains after the excision, the court must probe deeper; if not, the court makes no further examination and invalidates the affidavit. The Seventh Circuit's approach is to excise only intentional or reckless misstatements before determining probable cause.[37] Finally, the *Thomas* court applied its rule to all misstatements no matter what their source; the *Carmichael* rule is applicable only to statements made by government agents.[38]

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[32] *Id.* at 669.

[33] *Id.*

[34] 489 F.2d at 989.

[35] 489 F.2d at 671 n.5.

[36] *Id.* at 668.

[37] 489 F.2d at 989.

[38] In *Carmichael,* the court stated:

> The rule we annonuce today is intended only to test the credibility of government agents whose affidavits or testimony are before the magistrate. The two-pronged test of Aguilar v. Texas, 378 U.S. 108 . . . (1964), sufficiently tests the credibility of confidential informers. Consequently, defendant may not challenge the truth of hearsay evidence reported by an affiant. He may, after a proper showing, challenge any statements based on the affiant's personal knowledge, including his representations concerning the informer's reliability, his representation and his implied representation that he believes the hearsay to be true.

489 F.2d at 989.

The *Thomas* and *Carmichael* decisions concur on the point that intentional falsities, whether material or not, will cause the entire affidavit to be vitiated.[39]

In light of these two decisions, the *Marihart* court chose to adopt the rule pronounced by the Seventh Circuit in *Carmichael* which imposed the strict requirement that the defendant must show intentional or reckless but material misstatements on the part of the affiant before evidence would be suppressed.[40] With this rule as a guide, the *Marihart* court tested the inaccuracies challenged by the appellants.[41] The court found that the motion to suppress had been properly overruled, and the decision of the lower court was affirmed. A complete examination of the record by the court had resulted in a finding that the inaccuracies were "peripheral in nature and there were no material misstatements made in connection with the securing of the search warrant."[42]

The *Marihart* decision adds strength to the earlier holding of *Carmichael* and emphasizes a growing disparity among the federal courts deciding the issue of the standard to apply once the truthfulness of an affidavit is attacked.[43] Unless definitive guidelines are established by the Supreme Court in the near future, a variety of procedural models dealing with this issue, and the question of the propriety of an attack on the truthfulness of an affidavit, may begin to proliferate among the federal courts of appeal.[44]

Of the principal cases discussed above, none strike the proper balance between the right of citizens to be free from unreason-

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[39]The *Carmichael* court stated:

> [W]e conclude that if deliberate government perjury should ever be shown, the court need not inquire as to the materiality of the perjury. The fullest deterrent sanctions of the exclusionary rule should be applied to such serious and deliberate government wrongdoing.

489 F.2d at 989. The *Thomas* court asserted: "[W]e are convinced that there would be a sufficient basis for invalidating a search warrant if the error was intentional, even though immaterial to the showing of probable cause." 489 F.2d at 671.

[40]The *Marihart* court also agreed that innocent misstatements, although material to establishing probable cause, should not invalidate the supporting affidavit and the subsequent issuance of a warrant. 492 F.2d at 900 n.4.

[41]*Id.* at 900-01.

[42]*Id.* at 901.

[43]The Fifth Circuit, in a case decided shortly after *Marihart*, reasserted its position. United States v. Hunt, 496 F.2d 888 (5th Cir. 1974) (dicta).

[44]The Court in three recent cases has denied a hearing on the issue of whether the truthfulness of underlying facts in an affidavit may be attacked. Stanley v. United States, 427 F.2d 1066 (9th Cir.), *cert. denied*, 400 U.S. 936 (1970); Mitchell v. Illinois, 45 Ill. 2d 148, 258 N.E.2d 345, *cert. denied*, 400 U.S. 882 (1970); Bak v. Illinois, 45 Ill. 2d 140, 258 N.E.2d 341, *cert. denied*, 400 U.S. 882 (1970).

able searches and seizures[45] and the need for effective crime detection and control. The Seventh and Eighth Circuits take a position too heavily weighted in favor of those responsible for law enforcement, while the Fifth Circuit's position seems unreasonably weighted in favor of criminal defendants. The one encouraging aspect of these decisions is the fact that these jurisdictions do agree that intentional misstatements in an affidavit will result in the exclusion of subsequently seized evidence.[46] It would be illogical, in light of the fourth amendment requirement that an oath or affirmation support the issuance of a warrant, to permit the statements made in an affidavit to be intentionally false. Surely the days are past when the courts are willing to allow constitutional freedoms to rest on the whims of the individual policeman who might at any time be willing to perjure himself to obtain a conviction.

It is clear that effective law enforcement would not be greatly hampered if courts were to invalidate warrants whenever negligent but material misstatements were found in an affidavit. However, a court would not strike the proper balance of the interests involved if it were to invalidate all warrants whenever negligence is shown. The better rule requires suppression only when the negligent statement is material to the establishment of probable cause.[47] Also, the potential for abuse is minimized if the burden of showing the misstatement to be negligent and material to a finding of probable cause is placed on the defendant.[48]

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[45]The fourth amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

[46]The *Carmichael* court stated the rule exemplifying this position. See note 39 *supra*.

[47]

> Exclusion of evidence only when procured by negligent misstatements *material* to showing probable cause should prod police to make prudent investigations about as well as would a full-scale exclusionary rule, since the police will usually not know until they apply for the warrant exactly *which* allegations will be critical. They will therefore probably seek to gather as much untainted evidence as possible to support the warrant against challenge.

Kipperman, *Inaccurate Search Warrant Affidavits as a Ground for Suppressing Evidence*, 84 HARV. L. REV. 825, 832 (1971).

[48]*See generally* People v. Alfinito, 16 N.Y.2d 181, 211 N.E.2d 664, 264 N.Y.S.2d 243 (1965). *Cf.* United States v. Napela, 28 F.2d 898 (N.D.N.Y. 1928); United States v. Goodwin, 1 F.2d 36 (S.D. Cal. 1924).

Innocent misstatements,[49] whether material or not, should not be excised from a warrant.[50] The circumstances surrounding the ferreting out of crime make it impractical, if not impossible, to eliminate innocent or good faith errors; the balance in such situations surely must shift to the side of effective law enforcement.

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[49]"This class contains both unintentional and nonnegligent misstatements of personal observation as well as reasonable reliance on an informer who turns out, for whatever reason, to have misstated the true facts." Kipperman, *supra* note 47, at 832.

[50]*Id.*